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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented in this petition arise from the continuing, long-running litigation over the remedial phase of the Kansas City, Missouri intradistrict school desegregation case, in which comprehensive and unprecedented educational, financial and physical resources have been provided, thus far at a cost in excess of $1.3 billion, to approximately 37,000 students — resulting in the creation of a system recently found by the District Court to offer "facilities and opportunities not available anywhere else in the country."

The questions presented are:

1. Whether a remedial educational desegregation program providing greater educational opportunities to victims of past de jure segregation than provided anywhere else in the country nonetheless fails to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the District, as measured by results on standardized test scores, has not risen to some unspecified level?

2. Whether a federal court order granting salary increases to virtually every employee of a school district — including non-instructional personnel — as a part of a school desegregation remedy conflicts with applicable decisions of this court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?

PARTIES TO THE PROCEEDING

A complete list of the parties to the proceeding is contained in the caption to the December 8, 1993 opinion of the Court of Appeals. Petition Appendix (hereinafter "Pet. App.") A-28 through A-29. The petitioners are the State of Missouri and its listed officials.

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OPINIONS BELOW

The November 29, 1993, opinion of the Court of Appeals is reported at 11 F.3d 755 and is reprinted at pages 1 to 27 of the accompanying appendix to this petition. The December 8, 1993, opinion of the Court of Appeals is reported at 13 F.3d 1170 and is reprinted at pages 28 to 35 of the appendix. The order of February 24, 1994, denying panel rehearing has not been reported. It is reprinted at pages 36 to 42 of the appendix. The order of March 15, 1994, denying the suggestion for rehearing en banc, along with the concurring opinion and the dissenting opinion joined by five of the ten active judges, has not been reported. It is reprinted at pages 43 to 68 of the appendix.

The District Court's orders of June 17, 1992, June 25, 1992, June 30, 1993, and July 30, 1993, have not been reported. They are reprinted at pages 69 to 121 of the appendix. Additionally, the District Court's order of April 16, 1993, to which significant reference is made by the Court of Appeals, is reprinted at pages 122 to 143 of the appendix.

JURISDICTIONAL STATEMENT

The judgments of the Court of Appeals were entered on November 29 and December 8, 1993. The order denying the petition for panel rehearing was entered on February 24, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition, arising out of the seventeen-year old Kansas City, Missouri school desegregation case, presents the Court with the opportunity to provide necessary guidance and clarification to the many lower courts supervising post-liability phase desegregation remedies. It squarely presents the issue of whether "success" in desegregation is measured by the degree to which equal opportunity has been provided, or whether equal outcomes are required. The Eighth Circuit set an outcome-based standard mandating increased student achievement, as measured by results on standardized test scores, as a prerequisite to a finding that the KCMSD is providing an equal educational opportunity and has eliminated the vestiges of prior de jure segregation. The Eighth Circuit also overstepped its authority in approving desegregation-funded salary increases for virtually all employees — including all non-instructional personnel — of the defendant school district. The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1343(a)(3).

1. The Prior Proceedings

In 1977, the Kansas City, Missouri School District ("KCMSD" or the "District") and certain KCMSD students filed their initial complaint charging that various named defendants, including the State of Missouri and its Board of Education and various officials, had caused unconstitutional interdistrict segregation throughout the Kansas City metropolitan area. After the District Court realigned the KCMSD as a defendant, *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978),[1] students in the KCMSD and in several other surrounding Missouri districts filed an amended complaint, adding claims of an intradistrict violation within the KCMSD.

The District Court rejected the claims for interdistrict relief, *Jenkins v. Missouri*, Order of June 5, 1984, *aff'd*, *Jenkins v. Missouri*, 807 F.2d 657, 671 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987), but found the KCMSD and State defendants liable on the intradistrict claims. The Court dismissed the federal Department of Housing and Urban Development and the suburban school districts.[2]

In 1985, as part of the remedial phase of this long-ranging litigation, the District Court began implementing an extensive array of quality education programs which have become known

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[1] Although a nominal defendant, the KCMSD, the recipient of the extraordinary funds provided by the State, has sided with the Plaintiffs in virtually every dispute throughout this protracted litigation. As Justice Kennedy noted, "[t]he Plaintiffs and KCMSD might well be seen as parties that have 'joined forces apparently for the purpose of extracting funds from the State treasury.'" *Missouri v. Jenkins*, 495 U.S. 33, 76 (Kennedy, J., concurring), *quoting Milliken v. Bradley*, 433 U.S. 267, 293 (1977) (*Milliken II*) (Powell, J., concurring in judgment).

[2] This case has been before this Court previously on two occasions. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (court-imposed tax increase); *Missouri v. Jenkins*, 491 U.S. 274 (1989) (attorneys' fees).

as the *Milliken II* components. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985). These included programs providing all KCMSD students with a vast array of additional educational opportunities, including additional educational materials, reduced class sizes, full day kindergarten, extended day programs and other general educational improvement programs. *See generally id* at 26-46. In a typical year, such programs alone cost approximately $54 million. Pet. App. A-143.

Subsequently, the District Court approved the joint request of the defendant KCMSD and Plaintiffs and directed implementation of a further comprehensive plan magnetizing all high and middle schools, and most elementary schools in the KCMSD. These included a performing arts middle and high school, a technical school offering vast and varied programs, a school with a large farm and wildlife area, and a $32 million dual-theme high school for computer and Classical Greek style education, including an indoor running track, gymnastics room and an Olympic-sized swimming pool and natatorium. To date, the magnet programs have cost $301 million, and magnet transportation has cost an additional $118 million. At the same time, the District Court approved a massive capital improvements program which has greatly enhanced the KCMSD physical plant. See *Missouri v. Jenkins*, 495 U.S. 33, 77, 80 (1990) (Kennedy, J., concurring) (outlining the contours of the "extraordinary remedy" ordered by the District Court); *Jenkins v. Missouri*, 931 F. 2d 470, 481 (8th Cir. 1991); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988). By 1989, $260 million in capital improvements had been ordered. *Jenkins*, 495 U.S. at 61. Currently, expenditures for capital improvements alone total approximately $417 million, with more requests forthcoming. The District Court unsurprisingly found these expensive and wide-ranging remedies "provide[d] the KCMSD with facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

As one part of the remedy, the District Court has provided salary assistance to the KCMSD teachers since 1987. In 1992 the District Court vastly expanded the scope of salary relief to include salary increases to all non-instructional personnel, as well as teachers. This expansion of the remedy added $13.7 million annually to the salary component of the remedy. Currently, all but three of the approximately 5,000 KCMSD employees receive salary increases from court-ordered desegregation funds.

In 1990 this Court — by a 5 to 4 vote — affirmed a method by which the KCMSD could increase taxes above those approved by the voters to pay its share of the extraordinarily costly remedy in KCMSD. *Missouri v. Jenkins*, 495 U.S. 33 (1990).[3] In his concurring opinion, Justice Kennedy, joined by the Chief Justice, and Justices O'Connor and Scalia, expressed serious concerns over the "extraordinary" scope of this remedy. Justice Kennedy noted that the remedy was unprecedented in its breadth and cost, to an extent "never before . . . approved" by the Court. He also questioned the need for numerous remedial components, the exclusion of which could have made the taxing mechanism affirmed by this Court unnecessary. 495 U.S. at 76-80 (Kennedy, J., concurring). The additional requirements of increased test scores and salary increases for virtually all KCMSD employees, which the Eighth Circuit imposed below, have since further increased the already "extraordinary" scope of this remedy.

To date, the wide-ranging remedies ordered by the District Court in this case have cost local and State taxpayers more than $1.3 billion. The State so far has paid approximately $838

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[3] The District Court had imposed a tax increase on KCMSD patrons directly. *Id.* at 41. The Eighth Circuit, while allowing the District Court's increase to stand, had modified the procedures to be used such that the Board would approve a levy. The District Court would then enjoin interference with the levy increase. *Id.* at 43. This Court rejected the District Court's approach, but affirmed the modified procedure. *Id.* at 58.

million in support of its share of the costs and some of the KCMSD's share through application of joint and several liability. The total cost for the *Milliken II* and salary increase components at issue here through February, 1994 is more than $300 million and $143 million, respectively. In addition to the massive desegregation payment KCMSD has received since fiscal year 1986, over the same time frame it has also received $471 million in regularly appropriated State funding for education. In the 1992 fiscal year, combining its regular and court-ordered desegregation expenditures, KCMSD spent the highest amount per pupil of any district in the State of Missouri, $13,500, fully $3,000 more per student than the next highest district. KCMSD, a constitutional violator, has expressed no interest in obtaining a return of local control, apparently intoxicated by the extraordinary funds it receives from the State Treasury. *See Milliken II*, 433 U.S. at 293 (Powell, J., concurring in judgment).

2. The Litigation Leading Up to the Court of Appeals' Opinions

Early in the remedial phase of this litigation, the District Court set forth its standard for the remedy:

> The long term goal of this Court's remedial orders is to make available to all KCMSD students *educational opportunities* equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district.

Jenkins, 639 F. Supp. at 54 (emphasis added). The District Court stated its rationale for providing these educational opportunities:

> In achieving this goal, the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct . . .

Id. In this Court's 1990 decision in this case, the four concurring Justices questioned the Constitutional necessity of the District

Court's "suburban comparability" standard. *Jenkins*, 495 U.S. at 76 ("It cannot be contended that interdistrict comparability, which was the ultimate goal of the District Court's orders, is itself a constitutional command.")

Following this Court's 1992 decision in *Freeman v. Pitts*, __ U.S. __, 112 S. Ct. 1430 (1992), the State sought partial unitary status with regard to the *Milliken II* programs. It premised its request on the undisputed fact that these programs had met, and in most cases vastly exceeded, the questionable standard set by the District Court for these programs in its 1986 remedial order. With regard to "suburban comparability," the State presented undisputed evidence that the programs in place in the KCMSD had exceeded opportunities available in *all* the suburban school districts in almost every area. Despite this uncontroverted evidence, and the District Court's later finding that suburban comparability standards had been vastly surpassed, Pet. App. A-115, the District Court rejected the State's partial unitary status arguments, instead ordering additional budgets for the programs. It wholly failed, however, to analyze the *Freeman* issues or render any findings whatsoever on those questions. Pet. App. A-69.

On appeal, a panel of the Eighth Circuit affirmed the District Court's order, and in the opinion imposed for the first time in the case an entirely new standard--surpassing even the questionable "suburban comparability" benchmark--for determining whether unitary status has been reached. The Court imposed the requirement that the State prove an unspecified level of improvement in student achievement, in place of the traditional measure of equal educational opportunity. Pet. App. A-21. While acknowledging that the decisions of this Court in *Board of Education v. Dowell*, 498 U.S. 237 (1991) and *Freeman* established the nature of the inquiry necessary in considering the question of partial unitary status, the panel went dramatically further, stating:

> The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation.

Pet. App. A-21.[4]

The result of the Eighth Circuit's decision is the creation of an unprecedented student performance-based test for analyzing the sufficiency of the quality education component of a remedy. The five judges dissenting from the denial of the State's petition for en banc rehearing recognized that the Eighth Circuit's new standard supplanted the traditional equal opportunity benchmark that has long guided Fourteenth Amendment jurisprudence.

In the same decision in which it injected the new student achievement standard, the Eighth Circuit panel also upheld the District Court's order granting across-the-board desegregation-funded salary increases to virtually all KCMSD employees. Such funding of District-wide salary increases first became an issue in the case in 1990, when the Plaintiffs, the KCMSD and an intervenor, American Federation of Teachers, Local 691

[4] That these statements contemplated an increase in test scores as a standard for a declaration of partial or full unitary status is clear, as those were the only measures of student achievement the District Court had addressed. Prior to the panel ruling, the District Court had stated, in dictum, that while the KCMSD magnet schools had increased educational opportunities and attracted some suburban non-minorities to the KCMSD, the KCMSD could not be declared partially unitary "because the District is still at or below national norms at many grade levels." Pet. App. A-131. The testimony of KCMSD witnesses at the hearing in May, 1992, which led to the District Court's June 17, 1992, order discussed test scores extensively, as the five judges dissenting from denial of en banc rehearing noted. Pet. App. A-62. Those judges concluded "the panel felt that student achievement, or lack thereof, was the watermark up to which the tide of desegregation effort must flow." *Id.* As noted, *infra* p. 10, the three judges concurring with the denial of rehearing en banc explicitly acknowledged the test results standard the panel had adopted.

("AFT") — the collective bargaining agent for KCMSD teachers — filed motions seeking court-ordered salary increases for both instructional and other non-instructional personnel. The District Court approved a settlement of the initial expanded salary requests, reserving the parties' right to raise subsequently any and all legal objections in its order of July 23, 1990.

The salary issue recurred in 1992 and 1993, when the AFT and KCMSD filed motions seeking additional across-the-board salary funding. The State opposed the motions arguing they requested relief beyond the scope of the remedy and unrelated to the constitutional violation, but the District Court approved desegregation funding for the increases. Order of June 25, 1992, Pet. App. A-76. These court-ordered salary increases covered not only teachers and administrators, but extended to non-instructional employees such as cooks, custodians, carpenters, laborers, electricians, parking lot attendants, security guards, secretaries, clerical workers, business administrators and data processing personnel. On appeal to the Eighth Circuit, the State reiterated its argument (again unsuccessfully) that the salary increases exceeded the District Court's authority because they were not tied to the constitutional violation under *Milliken II*, 433 U.S. at 281-82. The Court of Appeals affirmed the 1992 salary order in its November 29, 1993, opinion, Pet. App. A-1, and the 1993 order in the separate opinion of December 8, 1993. Pet. App. A-28.

Following the Eighth Circuit panel's ruling on these two issues, the State petitioned for rehearing of the Eighth Circuit panel opinions of November 29 and December 8, 1993, and also suggested rehearing en banc. The panel, modifying its initial decision only slightly, denied rehearing on February 24, 1994. Pet. App. A-36.

The full Court of Appeals — split 6 to 5 — denied rehearing en banc on March 15, 1994. Three judges, including Senior

Circuit Judge John Gibson, Judge McMillian (both of whom sat on the panel) and Judge Magill, joined a concurring opinion, while the five dissenting judges joined in an eighteen page opinion authored by Judge Beam.[5] The concurring judges made clear that, in their view, students' standardized test results were a factor in relieving a school district of court supervision:

> When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered.

Pet. App. A-48.

The dissenting judges, however, consisting of five of the ten members in regular active service on the Court of Appeals, expressed a sharply contrary view, writing:

> The District Court has, with the approbation of the panel, embedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard.

Pet. App. A-58. The dissent agreed with the State Defendants that the lack of improvement in standardized test scores was the only factor the District Court had found lacking in the parties' implementation of the desegregation remedy:

> The only factor the District Court saw standing in the way of unitary status for the educational program was continued below average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the

[5] The additional dissenters joining in the opinion were Judges Bowman, Wollman, Loken and Morris Arnold.

> educational enhancement (*Milliken II*) program of the KCMSD is wanting.

Pet. App. A-61.

The five dissenting judges also agreed with the State that salary increases for non-instructional personnel were beyond the scope of a legitimate remedy under *Milliken II*, stating that

> logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations.

Pet. App. A-57.

It is against this background of an unprecedented remedy, massive expenditures, and a sharply divided Court of Appeals that this long-running case comes once again to this Court.

REASONS FOR GRANTING THE WRIT

This petition presents two important constitutional issues arising in a desegregation case of "exceptional importance" and involving an array of in-place remedial programs "concededly without parallel in any other school district in the country." *Jenkins*, 855 F.2d at 1318-19 (Bowman, J., dissenting from denial of rehearing en banc). As Justice Kennedy, (joined by the Chief Justice and Justices O'Connor and Scalia) correctly observed in *Missouri v. Jenkins*, the result of the District Court's orders is an "extraordinary remedy" of a breadth "never before . . . approved" by the Supreme Court. 495 U.S. at 80. The remedy has since expanded.

This lawsuit has persisted for over 17 years, and the quality education component, initiated in 1985, has been fully in place since 1989. The case involves an "unparalleled educational experiment that has funneled more than $1.2 billion" into the Kansas City schools to eradicate the vestiges of past *de jure* segregation.[6] The issues at stake here will direct not only the future course and cost of the remedy in Kansas City, but will affect remedy-phase desegregation cases in metropolitan areas throughout the land.[7] For the reasons set out herein, the Court should grant the writ of certiorari and resolve these important issues.

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[6] A. Morantz, *Money, Choice and Equity: Major Investments With Modest Returns* 1 (Harvard Graduate School of Education 1994).

[7] *See, e.g., Brown v. Board of Educ. of Topeka, Shawnee County, Kan.*, 978 F.2d 585 (10th Cir. 1992); *Freeman* (DeKalb County, Georgia); *Diaz v. San Jose Unified School District*, 861 F.2d 591, 593 (9th Cir. 1988); *Tasby v. Black Coalition to Maximize Education*, 771 F.2d 849 (5th Cir. 1985) (Dallas); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984) (St. Louis); *United States v. City of Yonkers*, 833 F. Supp. 214 (S.D. N.Y. 1993); *Flax v. Potts*, 725 F. Supp. 322, 325-26 (N.D. Tex. 1989), *aff'd*, 915 F.2d 155 (5th Cir. 1990) (Fort Worth); *Reed v. Rhodes*, 455 F. Supp. 569, 597-602 (N.D. Ohio 1978) (Cleveland). Indeed, in the St. Louis, Missouri desegregation case, where local and state taxpayers have already spent over $1.6 billion, the District Court recently adopted, *sua sponte*, the Eighth Circuit's test requiring

(Footnote 7 continued on next page)

1. The Court of Appeals' Opinion Conflicts With Decisions of This Court Setting Forth the Standards and Limits of Desegregation Remedies. It Also Raises an Important Question of Federal Law That Has Not Been, But Should Be Directly Resolved by This Court — Whether, in Applying the *Freeman* Test for Unitary Status, a Court of Appeals Overseeing a School Desegregation Case May Require Increased Standardized Test Scores.

A. The Court of Appeals' Imposition of a Student Outcome-Based Standard for Unitary Status, Requiring Enhanced Student Achievement, Purports to Guarantee Outcomes Rather Than Opportunities and is Therefore Flatly at Odds With Settled Equal Protection Jurisprudence.

The Eighth Circuit's novel ruling would measure the constitutional sufficiency of a quality education component of a comprehensive desegregation remedy by the degree of improved student achievement, as measured by results on standardized test scores. This outcome-based standard, wholly foreign to traditional equal protection analysis, creates an entirely new and untenable standard for determining when a desegregation remedy has achieved its purpose to the extent practicable. Indeed, the Eighth Circuit's ruling eviscerates this Court's standard announced previously in *Dowell* and *Freeman* precisely because it interposes a requirement that is not "practicable." *Dowell*, 498 U.S. at 250; *Freeman*, 112 S. Ct. at 1446.

(Footnote 7 continued)

improved student achievement for unitariness. *Liddell v. Board of Education*, No. 72-100C(6), Order No. G (1156) 94 at 1-2 (E.D. Mo. May 2, 1994). Moreover, the addition of such a requirement as a prerequisite to a declaration of unitary status may cause renewed efforts to reopen cases in which the remedies did not contain such programs. *See Jenkins*, 495 U.S. at 78 (Kennedy, J., concurring).

Neither this Court nor any other federal appellate court has ever adopted the benchmark of enhanced student achievement as a prerequisite to either full or partial unitary status. In fact, as noted by the five Eighth Circuit judges dissenting from the denial of rehearing *en banc*, this Court long ago rejected the notion that there is a constitutional right to analogous relief, in the context of racial balance in the form of any particular degree of numerical racial mixing. In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 24 (1971), this Court stated:

> If we were to read the holding of the district court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

Id. See also Pet. App. A-63. Indeed, the Court's unwillingness in *Swann* in 1971 to set outcomes as a test for racial balancing necessarily dooms the Eighth Circuit's student outcome-based standard for educational achievement since it is integration, in the first place, that is the *raison d'etre* of desegregation remedies. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In the courts below, no party disputed the State's showing that it had complied with the District Court's orders requiring massive funding of over $300 million for implementation of the quality education component of the remedy. Likewise, no party contested the State's showing that the overall quality of education programs the KCMSD offered was equal to or better than analogous programs offered in any surrounding Missouri suburban school district. The comprehensive remedy has provided the KCMSD with numerous quality education programs, magnet schools (every high school, every middle school and more than two-thirds of the elementary schools) providing varied themes and options for all KCMSD students to choose from, and substantial capital improvements, including numerous new buildings, widespread general renovation and the addition of specialized facilities for magnet programs. *See generally* Pet. App. A-

53 - A-55; *Jenkins*, 855 F.2d 1295 (8th Cir. 1988). The remedy is unprecedented in scope and cost. *Jenkins*, 495 U.S. at 76-77 (Kennedy, J., concurring). Indeed, as the District Court itself found, "KCMSD [has been given] facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

The result of these Herculean efforts is unparalleled quality education programs for all KCMSD students, regardless of race. Indeed the District Court found that the KCMSD educational opportunities were unsurpassed by any school district, whether located in suburban Kansas City, McLean, Virginia, or anywhere else. In providing these extraordinary opportunities, the State has more than fulfilled its obligation to remedy the vestiges of "a system-wide reduction in student achievement," *Jenkins*, 639 F. Supp. at 24. Against this background, the Eighth Circuit's attempt to raise the bar yet another notch is flatly inconsistent with the principles of *Swann* and should not be permitted to stand.

Other equal protection decisions of this Court fully support the principle that federal courts may not require, as a prerequisite to unitary status, that a school district guarantee to its students that they attain some arbitrary level of achievement. Just as "[i]t cannot be contended that interdistrict comparability, which was the ultimate goal of the District Court's orders, is itself a constitutional command," so too the Eighth Circuit's creation of a guaranteed outcome standard is clearly outside the Equal Protection Clause's mandates. *Missouri v. Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring). Indeed, the District Court's initial "suburban comparability" standard concerned itself only with facilities and programs — factors at least within government's power to control. A student performance standard, largely beyond the effective control of the State or KCMSD, far exceeds even that questionable benchmark. *See* pp.19-23 *infra*.

Simply because education is at issue here does not dictate deviation from the Court's traditional equal protection analysis.

This Court has repeatedly held that education *per se* is not a fundamental right. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988); *Papasan v. Allain*, 478 U.S. 265, 284 (1986); *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973). The Constitution simply does not contain any guarantee of an education of any particular quality or of any particular level of achievement by the students, individually or collectively. In *Rodriguez* this Court plainly distinguished between protection of rights and supposed guarantees of those rights to particular levels:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.

Id. at 36 (emphasis in original).[8] Nothing in the decisions of this

[8] *Rodriguez* properly questioned how a right to a particular quality of education could even be effectuated based on the substantial debate regarding "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education." *Id.* at 43 (footnote omitted); *see also id.* at 46 n.101 (questioning whether funding higher teacher salaries and lowering pupil-to-teacher ratios leads to higher educational quality). This legitimate inquiry is illustrated by the experience in the KCMSD. The Morantz study, concerning the Kansas City school desegregation plan, *supra*, pg. 12, n.6 concluded that "the many millions spent have yielded little conclusive evidence that achievement has improved to any more than a modest degree." *Id.* at 1. However, the District Court was not satisfied with these results because it impermissibly concluded that the scores of KCMSD students had to rise to the level of national norms before unitary status could be granted. In light of the numerous factors external to the school environs affecting student performance, *see infra*, at 19-23, it is simply not "practicable" to impose such a student achievement benchmark. *Freeman*, 112 S.Ct. at 1446.

Court supports a guarantee in the school desegregation context of student achievement at any particular level.[9]

In other contexts this Court has likewise never interpreted the Fourteenth Amendment to require equal outcomes; indeed it has rejected that flawed approach. The Court has long defined an equal protection injury as the denial of equal opportunity resulting from the imposition of an unconstitutional barrier, *see, e.g.*, *Turner v. Fouche*, 396 U.S. 346, 362 (1970), not the ultimate inability to obtain the benefit. *Id.* (Plaintiffs had the right to be *considered* for the board of education without the burden of invidiously discriminatory disqualifications, but had no right to be *appointed* to the board). The Court has continuously referred to this standard in determining, for standing purposes, whether a plaintiff has suffered an actionable injury under the Equal Protection Clause. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 962 (1982); *Regents of University of California v. Bakke*, 438 U.S. 265, 281, n.14 (1978).

[9] As one district court correctly noted:

> The 14th Amendment requires an equal education. There is no constitutional guarantee of a quality education. The Constitution is satisfied if all of the students . . . [in a school district] receive an equally bad education, regardless of race.

Coalition to Save Our Children v. Board of Education, 757 F. Supp. 328, 350 (D. Del. 1991). In Kansas City, of course, "KCMSD students have in place a system that offers more educational opportunity than anywhere in America." Pet. App. A-65.

Similarly, the California Supreme Court has stated:

> [T]he primary objective of a desegregation plan is to achieve a *uniformity of educational opportunities* for all races by eliminating the detrimental effects of a segregated school system . . .

McKinny v. Oxnard Union High School District Board of Trustees, 642 P.2d 460, 463 (Cal. 1982). It is not to require test score increases or guarantee equality of results.

Most recently, the Court applied the equal protection injury analysis in *Northeastern Florida Contractors v. Jacksonville*, __ U.S. __, 113 S. Ct. 2297 (1993), in which an association of general contractors challenged a city ordinance according preferential treatment to minority-owned businesses in awarding city contracts. *Id.* at 2299. The Court determined that because the association was denied the opportunity to bid on certain contracts, they had suffered an injury cognizable under the Equal Protection Clause. *Id.* at 2304.

In reaching this conclusion, the *Jacksonville* Court specifically analyzed its 1975 decision in *Warth v. Seldin*, 422 U.S. 490 (1975), where the Court determined that a construction association had not suffered an injury cognizable under the Equal Protection Clause. In distinguishing the earlier case, the Court noted that the *Warth* plaintiffs had made no claim that the construction association's members could not apply for permits on the same basis as other firms. The *Jacksonville* Court stated there was no equal protection injury in *Warth* because "[t]he firms' complaint ... was not that they could not compete equally; it was that they did not win." *Jacksonville*, 113 S. Ct. at 2304.

This Court's previous decisions regarding the goals of school desegregation and equal protection have focused upon providing the *opportunity* to obtain a benefit; not the ultimate benefit itself. Plainly, the District Court's original finding of discrimination in this case cannot be used to create a wholesale shift in equal protection injury analysis, particularly in light of the uncontested opportunity level created in KCMSD. Therefore, the Eighth Circuit's requirement of a guaranteed outcome far exceeds the Equal Protection Clause's mandate.

B. Factually and Constitutionally, the Eighth Circuit's Student Outcome-Based Standard is Untenable Because Factors Outside the Control of Government and Unrelated to De Jure Segregation Dramatically Affect Student Achievement.

This Court and others have long recognized that numerous factors beyond the provision of educational resources dispositively affect students' standardized test scores. This case presents a textbook example of that proposition. In *Board of Education v. Rowley*, 458 U.S. 176, 198 (1982), for example, this Court in dealing with a claim under the Education of the Handicapped Act, noted that

> a myriad of factors ... might affect a particular student's ability to assimilate information in the classroom.

Similarly, in *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308, 1312-13 (4th Cir. 1987), the Fourth Circuit held that poverty and ineffective educational philosophy were responsible for remaining achievement disparities between majority and minority students. In the instant case, Judge Beam, writing for the five dissenters, correctly noted that:

> To require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control. Segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement, if they exist in the KCMSD, are not the responsibility of the public school system.

Pet. App. A-64. The Eighth Circuit panel's initial decision simply assumed that the State could be required to fund programs to eliminate any deficiencies in student achievement test scores. It also assumed — without any basis — that the State could succeed in raising test scores, apparently through the continued application of massive resources, without even exam-

ining whether these or other factors would have any impact on student achievement.[10]

Conversely, this Court has routinely limited remedial responsibilities to matters within the control of defendants. As the Court stated in *Freeman*, "[w]here control lies, so too does responsibility." *Freeman*, 112 S. Ct. at 1445. Necessarily, where control does not lie, as in the case of student achievement, so too responsibility should not be imposed.[11] Similarly, this Court has recognized that "'[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases.'" *Milliken II*, 433 U.S. at 280 (quoting *Milliken v. Bradley*, 418 U.S. 717, 763 (1974) (*Milliken I*) (White, J. dissenting)); *see also Swann*, 402 U.S. at 22 ("the elimination of

[10] The panel decision did not discuss any evidence on the influence of factors not within the control of the school system. Nor was any such evidence presented before the District Court because the requirement of improved student achievement first surfaced in the panel's opinion.

That factors other than educational resources determine results on standardized test scores has been recognized not only by the Fourth Circuit and the dissenting judges of the Eighth Circuit, but also in the scholarly literature. *See* W.L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. Rev. 1693, 1703 (1993) (link between concentration of poverty in public schools and performance on tests of basic reading skills); G. Jaynes and R. Williams (eds.), *A Common Destiny; Blacks and American Society*, 366, 369, 372, National Academy Press: 1989 (discussing effect of socioeconomic status, family size and peer pressure on educational outcomes); D. Armor, *Why is Black Educational Achievement Rising*, The Public Interest, Summer 1992, p. 66 ("It is well-documented that socioeconomic factors are among the major explanations of black-white achievement differences. . .").

[11] In language at odds with the opinions before this Court, the Sixth Circuit has held "[t]he Constitution imposes no duty on school officials to correct segregative conditions resulting from factors over which they have no control . . . ." *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1049 (6th Cir. 1977); see also *Higgins v. Board of Education*, 508 F.2d 779, 791 (6th Cir. 1974). Clearly, the principle applies equally to the quality education context.

racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage."). Indeed, any other standard would vitiate the holdings of *Dowell* and *Freeman* that desegregation remedies are temporary in nature and limited in purpose to eradicating vestiges of discrimination to the "extent practicable."

In light of the effect on student achievement exerted by non-instructional factors, the Court of Appeals' requirement of improved student achievement greatly exceeds the Fourteenth Amendment's guarantee of "equal educational *opportunity* for our Nation's children." *Missouri v. Jenkins*, 495 U.S. at 80 (Kennedy, J., concurring) (emphasis added). If permitted to stand, such a standard would mark a radical departure from this Court's established requirement that only purposeful discrimination is remediable under the Fourteenth Amendment, *see, e.g.*, *Washington v. Davis*, 426 U.S. 229, 240 (1976), and that, in any case, a constitutional remedy must be tailored to the injury caused by the constitutional violation. *Milliken II*, 433 U.S. at 281-82.

This Court recognized in *Freeman* that it was beyond the scope of a court's authority to require that a desegregation remedy alleviate conditions that were beyond the school district's power because to do so would mean such cases would never end:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.

Freeman, 112 S. Ct. at 1448. This principle from *Freeman* is consistent with the Court's admonition the previous term in

Dowell: "[w]e emphasize that federal judicial supervision of local school systems was intended as a temporary measure." *Freeman*, 112 S. Ct. at 1445. Similarly, in *Pasadena Board of Educ. v. Spangler*, 427 U.S. 424, 434-35 (1976), this Court declined to require continued supervision of a defendant school district which had complied with a desegregation order requiring a certain racial balance:

> [I]n this case, the district court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the district court was not entitled to require the [school district] to arrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the parts of the defendants, the district court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-37.

The Court of Appeals' requirement that the State and the KCMSD demonstrate a test score increase as a prerequisite to withdrawal of court supervision in this case would condemn the KCMSD to supervision by the Court for an indefinite period, contrary to the principles espoused by this Court in *Freeman* and *Dowell*. The KCMSD may well approve of continued judicial supervision, *see* Pet. App. A-62 (KCMSD Administrator endorsing a 100 year remedy), because that would keep extraordinary desegregation funds from the State flowing into the KCMSD. However, such indefinite judicial control is contrary to this Court's mandate that school districts under desegregation orders be returned to the control of State and local authorities once they are operating in compliance with the Constitution. This Court

has strongly emphasized local control of schools in its previous opinions, most recently in *Freeman:*

> As we have long observed, 'local autonomy of school districts is a vital national tradition.'

Id., 112 S. Ct. at 1445, *quoting Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977); see also *Dowell*, 498 U.S. at 248 (discussing "'the important values of local control of public school systems'"), *quoting Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979) (Kennedy, J., concurring). The Eighth Circuit's ruling is precisely contrary to these holdings.

For these reasons, this Court should grant certiorari to reverse the Eighth Circuit's erroneous constitutional interpretation.

2. A Federal Court Order Granting Salary Increases to Virtually Every Employee of a School District as a Part of a School Desegregation Remedy Conflicts with Applicable Decisions of this Court, Which Require that Remedial Components Must Directly Address and Relate to the Constitutional Violation and be Tailored to Cure the Condition that Offends the Constitution.

In *Milliken I* this Court said that "[t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation, *Id.*, 418 U.S. at 745 (citing *Swann*, 402 U.S. at 16). In *Milliken II* this Court held that federal court remedial orders must directly address and relate to the constitutional violation itself. *Milliken II*, 433 U.S. at 281-82. This Court has also held that before a court may impose a remedial program, it must be satisfied that "the constitutional violation caused the condition for which remedial programs were mandated." *Id.* at 286, n.17. In *Freeman* this Court followed that principle, stating that "a remedy is justifiable only insofar as it advances the

ultimate objective of alleviating the constitutional violation." *Freeman*, 112 S. Ct. at 1445.

This controlling principle, of course, is consistently applied in other cases dealing with remedies for constitutional violations:

> This principle was not one limited to school desegregation cases, but was instead 'premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context.'

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 399 (1982) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976)).

Here, the District Court has never found that low district-wide salaries violate either the constitutional rights of the students, teachers or other staff of the KCMSD or that they flow from any earlier constitutional violation by the State. Nevertheless, the Eighth Circuit panel affirmed the District Court's orders granting salary increases to virtually every employee within the KCMSD, without regard to whether they had instructional duties or even any interaction with the students.[12] Insofar as the District Court's order pertains to non-instructional personnel, it clearly does not address or relate to the constitutional violation upon which this remedy is premised — the defendants' historical denial of an equal educational opportunity.

The panel premised its ruling on the dubious and speculative assumption that providing salary increases to District employees would "improve the KCMSD's desegregative attractiveness." Pet. App. A-26. It is conceivable such an argument could apply to increases specifically tailored to attracting specialists needed to implement the magnet programs or to other necessary instruc-

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[12] The only District employees who do not receive court-ordered salary increases are the Superintendent and two highly-paid administrators.

tional personnel, who were unavailable for salary reasons. However, there is absolutely no legal or factual basis to assume that providing raises to parking lot attendants, custodians, cooks and other similar non-instructional personnel will reverse the effects of the defendants' past de jure discrimination. As Judge Beam noted, writing for the five judges dissenting from the denial of the suggestion for rehearing en banc:

> [T]he current effort by the KCMSD and the American Federation of Teachers (AFT), aided by the Plaintiffs, to bypass the collective bargaining process is uncalled for and is probably not an exercise reasonably related to the constitutional violations found by the Court in 1985. Further, it enables the KCMSD to involve the State, via the joint and several liability holdings of the Court, in pay raises the KCMSD probably could not impose upon its constituents. The Court's salary order also enables the teachers' union to achieve goals that would be unattainable under the bargaining process.

Pet. App. A-58. Judge Beam later added:

> I agree with the State that logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations.

The District Court's unprecedented salary order finds no support in the caselaw. In a decision setting a standard at odds with the decision below, the Second Circuit stated that a desegregation remedy should not be used to provide general upgrades to school systems implementing desegregation remedies:

> [A] court must be alert not to permit a school board to use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation.

Arthur v. Nyquist, 712 F.2d 809, 813 (2d Cir. 1983). Justice Kennedy, writing for three other members of the Court, reaffirmed this principle in his concurring opinion in *Missouri v. Jenkins* 495 U.S. at 77.

The salary increase ordered here includes substantial numbers of personnel not remotely related to desegregation. The increases for non-instructional personnel cannot be justified under the previous holdings of this Court. As with the requirement of student test score increases, permitting school desegregation cases to be used for such purposes would establish an unsound precedent for remedies in desegregation cases as well as other cases involving institutional constitutional violations.

CONCLUSION

The Eighth Circuit's creation of an outcome-based student achievement standard for unitary status far exceeds the Equal Protection Clause's established guarantee of equal opportunity. It is neither traceable to any constitutional injury in this case nor is it a tenable standard. Moreover, in application it would plainly contravene this Court's recent pronouncements on the proper duration and purposes of desegregation remedies. Similarly, the Court of Appeals' ruling approving salary increases for all non-instructional personnel — paid for by extraordinary desegregation funds — is plainly outside the scope of a proper desegregation remedy. Therefore, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2238
No. 91-3636

Kalima Jenkins, by her friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Plaintiffs,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley; Dan L. Blackwell; Gary M. Cunningham; Raymond McCallister, Jr.; Susan D. Finke; Thomas R. Davis; Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,
Defendants-Appellants,

School District of Kansas City, Missouri
Claude C. Perkins, Superintendent thereof,
Defendants-Appellees.

No. 92-3194
No. 92-3200

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook,

Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,
Defendants-Appellants,

School District of Kansas City;
Walter L. Marks, Superintendent thereof,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Submitted: September 15, 1993
Filed: November 29, 1993

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The State of Missouri appeals from four orders of the district court[1] entered in the ongoing Kansas City school desegregation case. The district court ruled in two orders that base costs of the original group of magnet schools were properly included as desegregation costs, which the State could be required to pay as a result of its joint and several liability for desegregation expenses. The State argues that the district court erred in placing

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* Although we are aware that many of those named as defendants no longer hold their offices and substitution of public officers is automatic under Fed. R. App. P. 43(c), the parties have not notified us of the names of the successors in office. Therefore, we have not amended the style in this case.

[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

this expense on the State, because in earlier orders the district court had required that these orders be paid by the Kansas City, Missouri School District. The State appeals the district court order approving certain quality education programs known as *Milliken II* programs after *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), for the 1992-93 school year.[2] The State contends that the *Milliken II* programs already in place had achieved the goals set for them, and had attained unitary status under *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), and the district court erred in not recognizing this and in ordering further programs. Finally, the State appeals from orders requiring the State to pay for a salary increase for KCMSD teachers and other employees. We affirm the orders of the district court.

I.

The first two appeals involve orders allowing the base costs of the "flagship magnets" as desegregation expenses for which the State and KCMSD are jointly and severally liable. The flagship magnets (also referred to as the "1986-87" magnets in reference to their inception date) are schools that existed before the desegregation remedy and were converted into magnet schools as part of the desegregation remedy.[3] The costs that KCMSD would have incurred in running these schools, regardless of the desegregation remedy, are referred to as "base costs." Costs associated with the magnet themes are called "incremental magnet costs."

In the original magnet school order, June 16, 1986, the court made no distinction between base costs and incremental costs for

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[2] The *Milliken II* programs included extended day, effective schools, 1986-87 magnets, district communications, security, playground equipment, Central High School athletic team travel, and extended day program for Westport School.

[3] The flagship magnets are the three schools of the Southwest cluster (Cook, Hartman, and Marlborough), Swinney and Volker, and the Lincoln College Preparatory magnet.

the flagship schools, but classified the total amount as a desegregation expense, allocating half to the State and half to the KCMSD. *Jenkins v. Missouri*, 639 F. Supp. 19, 53-55 (order on pending motions) (W. D. Mo. 1985), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied as to this order*, 490 U.S. 1034 (1990). The State alluded to this very briefly in an appeal of that funding order, complaining that the district court "held all of the operating costs of the schools, whether part of the original budgets or newly ordered by the court, were to be counted as necessary desegregation expenses," and that the court had "effectively transfer[red] to the desegregation plan all of the operating expenses of the schools." We affirmed the June 16, 1986 order, though without discussion of this point. *Jenkins v. Missouri*, 855 F.2d 1295, 1319 (8th Cir. 1988) (*Jenkins II*), *cert. denied in relevant part*, 490 U.S. 1034 (1989).

The district court in November 1986 ordered a more extensive "Long Range Magnet Plan" which created new magnets in addition to the flagship magnet schools. The Long Range Magnet Plan budget distinguished between base and incremental costs for the new magnets, and required the KCMSD to pay base costs from its operating budget. On July 25, 1988, the district court decided that the flagship magnets and the new magnets should be funded according to the same principles, and that it would therefore not require the State to pay the base costs for the flagship magnets for 1988-89. Because the KCMSD could not show which costs were base and which incremental, the court simply included the whole cost in the desegregation budget, but allowed the State a credit for the base amount, which was to be determined later. The court issued a similar ruling for 1989-90.

Before the State obtained the benefit of these credits, however, money problems intervened. The court stayed the orders requiring the KCMSD to pay the 1988-89 and 1989-90 base costs, pending a review of KCMSD's finances by an independent

consulting firm to determine what KCMSD could pay for out of its operating budget.[4]

Two orders are on appeal, dated June 26, 1990 and July 5, 1991, in which the district court approved the total expenses for the flagship magnets as desegregation expenses for the years 199091 and 1991-92, respectively. In those orders, the court allocated the flagship base costs entirely to the KCMSD, but the effect of joint and several liability is that the State could be called on to pay these costs. In the 1990-91 order the court stated that the consultant's study was still pending, and that if the report should result in the February 1, 1990 stay order being lifted, the State could receive a credit for the base costs. In the 1991-92 order the court stated the budget study did not indicate that the KCMSD had the money to pay the base costs from its operating budget, and therefore, the costs would have to be shifted to the desegregation budget.

The State's objection is that by designating the 1990-91 and 1991-92 base costs as desegregation expenses, payable by the KCMSD, the court is indirectly requiring the State to pay the costs, through the operation of joint and several liability. The State raises four arguments against such a result.

First, the State argues that requiring it to pay for the ordinary costs of operating KCMSD's schools is impermissibly granting relief not related to the State's constitutional violation, since KCMSD would have had to pay the operating costs of its schools, whether or not the State ever committed a constitutional violation.

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[4] By later agreement of the parties, the State actually recovered the money from the 1988-89 and 1989-90 credits, out of the proceeds from property taxes that had been paid into escrow but were released for the District's use after the Supreme Court affirmed the property tax order under which they were authorized.

The cases the State cites are not directly applicable, since they either address situations in which there was no relation between the remedy ordered and the constitutional violation,[5] or simply refer generally to the requirement that the remedy be limited to rectifying conditions that offend the Constitution.[6] As we discuss at length in Part II, the effect of the constitutional violations in this case was to lessen student achievement in the KCMSD and to cause white flight. *Jenkins II*, 855 F.2d at 1300. It has already been determined that the proper remedy for these injuries is to improve the quality of education given to minority students and to implement superior educational programs that will attract white students back to the District and redistribute the whites concentrated in certain parts of the District. *Id.* The flagship magnet schools are a cornerstone of the remedial plan. The relation between payment of the magnets' base costs and the success of the constitutional remedy is evident. If KCMSD cannot pay the basic costs of keeping the schools open, the magnet programs at those schools cannot go forward and the remedial plan will be stillborn. It is therefore consistent with *Milliken II* to require the State to pay costs the KCMSD would have been otherwise responsible for when KCMSD cannot pay, and when failure to pay would fatally undermine the constitutionally-mandated remedy. In fact, it is settled law in this circuit that a desegregation remedy can require the State to pay the entire costs of educating at least some of a district's students, since we affirmed such an order in St. Louis over the same sort of objection the State makes here. *See Liddell v. Missouri*, 801 F.2d 278, 282-83 (8th Cir. 1986) (*Liddell IX*).

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[5] *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (*Milliken I*); *Liddell v. Missouri*, 731 F.2d 1294, 1309 (8th Cir.) (*Liddell VII*), *cert. denied*, 469 U.S. 816 (1984).

[6] *Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992); *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (*Milliken II*); *Swann v. Charlotte - Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

Next, the State argues that the district court's decision to place the base costs in the desegregation budget is inconsistent with other decisions that the district court has made in this case. The State argues that the authority of the court's orders separating base and incremental costs for the flagship magnets' 1988-89 and 1989-90 funding is not affected by the February 1, 1990 stay of those orders and the rationale of those orders should govern later years. We have recognized the practical flexibility of the court in shaping remedies and adjusting and modifying injunctions in *Jenkins v. Missouri*, 931 F.2d 470, 482 (8th Cir.) (*Jenkins III*), *cert. denied*, 112 S. Ct. 437 (1991), particularly where there are changed circumstances. The district court exercised this flexibility when it changed from full desegregation funding for the flagship magnets (as it had ordered before 1988-89) to separating base from incremental costs. In response to a budget study which "did not indicate that the KCMSD has resources available from its operating budget to support the base budgets," the court once again consolidated the base costs with incremental costs. There was adequate rationale for the change and the 1990-91 and 1991-92 orders do not conflict with the court's earlier treatment of the base costs.

The State quotes language from the district court opinion of July 5, 1991, in which the court rejected the KCMSD's "no money" argument in another context. The KCMSD had argued that because it was always out of money and could not pay for its operating costs, its operating and desegregation budgets should be merged, with the State required to pay any expenses the KCMSD could not afford. The district court rejected this argument, stating, "There is no legal authority for essentially transforming the State into a guarantor of KCMSD operating budget shortfalls." Order of July 5, 1991 at 9. The court then advised KCMSD either to pursue additional funding or to institute cuts to balance its operating budget. Even granting that there may be tension between the July 5, 1991 decision and the orders before us, the district court did not err or abuse its discretion in making

an adjustment or modification of its earlier equitable orders dealing with the flagship magnets' funding, so vitally important to the remedy of the constitutional violations.

Finally, the State suggests that the entire issue should be remanded to the district court for reconsideration in light of the State's enactment of a new school finance formula, which the State argues will provide significantly greater state funding to KCMSD. This new development may well affect funding in future years, but at this point we simply do not know how. Any effect it may have will be determined by the district court as it considers future funding orders. It is not appropriate that we consider it in the first instance.

The parties evidently delayed the presentation of this appeal for some time in the hopes that the issue would be settled by the report of the independent consultant. It was only when the report's result did not reveal sufficient money available to KCMSD to solve the problem that the State prosecuted its appeal. We view this as a recognition of the need to balance the many conflicting issues in crafting an appropriate remedy, and this further supports our conclusion that we should affirm the district court's orders with respect to the base costs of the flagship magnets.

II.

The State argues that the district court erred as a matter of law or, in the alternative, abused its discretion by failing to address in its June 17, 1992 order the State's argument that the *Milliken II* quality education programs were unitary. Even if the district court was not obliged to make findings on this issue, the State argues that it abused its discretion in failing to hold the district unitary in the quality education area. We affirm the district court's judgment.

KCMSD submitted its motion for approval of the desegregation plan for 1992-93, including continuation of the *Milliken II*

programs, which the court had originally approved in order to improve student achievement in the KCMSD. While the KCMSD's motion was pending, the United States Supreme Court decided *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). The State then relied on *Pitts* to argue that the *Milliken II* programs had been implemented fully and that the court should declare these programs unitary and return responsibility for them to the school district. The court held a hearing on the 1992-93 budget issues on May 27 to 29, 1992, and while rejecting some requests, ordered most of the *Milliken II* programs fully funded.

The June 17, 1992 order approved the KCMSD's 1991-92 budgets without comment. Order of June 17, 1992 at 7. In granting the funding, it is evident that the district court rejected the State's arguments. The district court did not err in so ruling, even though it did not articulate its reasoning in approving the funds. Rejection of the State's argument is demonstrated by the district court's failure to make findings based on these arguments. *See Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39, 45 (7th Cir. 1961) ("[F]ailure to enter findings with respect [to certain evidence] is tantamount to findings adverse to appellants upon the evidence."), *cert. denied*, 369 U.S. 851 (1962). The district court need not make specific findings on all facts, but must only rule on the ultimate facts necessary to reach a decision in the case. *United States v. F.D. Rich Co., Inc.*, 439 F.2d 895, 899 (8th Cir. 1971); *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 808 (8th Cir. 1976) ("It is well established that the trial court does not need to make specific findings on all facts but only must formulate findings on the ultimate facts necessary to reach a decision."). The district court's order some nine months later in which it anticipated an orderly and gradual withdrawal of court control demonstrates the court's grasp of the *Freeman v. Pitts* argument asserted by the State, and of the issues there raised.

Were we to entertain any question about the import of the district court's June 17, 1992 order, the district judge's comments from the bench during the hearing and later orders raising the same or similar issues answer our concerns. The State argues that the court should have declared the KCMSD unitary in regard to the quality education programs because the only goal of the desegregation remedy is the "full implementation" of the remedial programs, which the State asserts it has accomplished. However, during the hearing the court pointed out that the goal was not to implement certain programs, but rather to integrate the school district. Judge Clark stated:

> The [c]ourt's goal was to integrate the Kansas City, Missouri, School District . . . and all these other matters were elements to be used to try to integrate the [KCMSD] . . . . That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal. . . . But when [the State] says no particular goal has been set, I think [it is] in error.

Judge Clark's order rejecting funding for some of the programs and granting funding for continuation of other programs could only have done so on the basis that the goals of the desegregation programs, the elimination of the vestiges of past discrimination to the extent practicable, had not yet been achieved.

Because this desegregation litigation is ongoing, we also find it appropriate to refer to later orders which show that the district court considered and rejected the State's arguments. Nine months after the order giving rise to this appeal, the court considered a motion for approval of the Long Range Magnet Renewal Plan. On April 16, 1993, the district court entered an order which dealt more explicitly with many of the arguments now urged by the State. Order of April 16, 1993. None of the parties has appealed this April 1993 order. Yet, this order helps illuminate the June 1992 order now before us. In the April order, the district court made the sort of findings contemplated by *Freeman*, anticipating an orderly and gradual withdrawal of court control. *See* 112 S. Ct. at 1445.

In the April 1993 order, the district court defined the first issue as whether the magnet programs have improved the educational lot of the victims of unconstitutional segregation and whether approval of the Long Range Magnet Renewal Plan would likely result in additional educational progress. The second issue was whether the original Long Range Magnet Plan had helped the KCMSD reverse white flight, and whether the Long Range Magnet Renewal Plan would bring more white students into the District. The third issue the court considered was whether the magnet programs have redistributed the students within KCMSD for maximum desegregation and whether the Renewal Plan would result in stabilization and further enhancement of desegregative gains.

The district court commented on the substantial progress made in desegregating KCMSD schools. The court found that there had been a trend of improvement in academic achievement, but that the school district was far from reaching its maximum potential because KCMSD is still at or below national norms at many grade levels. Order of April 16, 1993 at 11. The court observed that the magnet school plan has been successful overall, with a substantial pool of suburban whites expressing an interest in attending KCMSD magnet schools. *Id.* at 9. The educational opportunities afforded in the magnet schools are better than previously available. *Id.* at 13. The court then extended the duration of the magnet plan. *Id.* at 14. The court stated that it was important to maintain the magnet plan as it is because of the positive impact on both the desegregation effort and on achievement. *Id.* at 20. The court ordered a two-year extension of the current plan (with certain modifications) in order to maintain the integrity of the programs currently offered, and to allow the KCMSD to better measure the effectiveness of the programs. *Id.* The court expressed a need for the parties' views of an effective method by which the district may fund its share of the programs. It directed the KCMSD to submit a plan commensurate with current funding or at a level permitting

maintenance of the same quality of both facilities and instruction, assuming withdrawal of court ordered funding at alternative intervals of three, five, seven or ten years. *Id.* at 21.

In essence, the court's order indicated that the magnet school plan had been substantially successful, that further areas for improvement still existed, and that the court was looking forward to the day when a gradual phase-out would be considered. This order specifically addresses the issues raised by *Freeman v. Pitts*. *See* 112 S. Ct. at 1446 (listing factors a district court must consider to order a partial withdrawal of its supervision).

Further, the district court's July 30, 1993[7] order regarding *Milliken II* programs expressly decides these issues. The State appealed this order but raised no *Freeman v. Pitts* arguments; the State only attacks the salary issue. We refer to the July 1993 order only as it fleshes out the meaning of the earlier district court orders dealing with the *Freeman* issues. In the July order the district court stated that it had previously ruled in the April 16, 1993 order as a result of the Long Range Magnet Renewal Plan that "KCMSD has not met the goals and standards set by the [c]ourt in establishing the desegregation remedy." Order of July 30, 1993 at 3. The court unambiguously stated: "The court finds that the State's arguments that these components have attained unitary status are unpersuasive." *Id.* These statements leave no doubt that the court rejected the State's *Freeman* arguments in July 1993, and it follows that in this ongoing litigation, it did so in the earlier orders dealing with the issue.

The court said next that the State argues inconsistently that the desegregation plan is a complete failure, but on the other hand, that the *Milliken II* components are completely successful. The court also concluded that the State has continued to make fundamentally flawed arguments in pursuit of an order determin-

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[7] This appeal bears our docket No. 93-3274, and was argued November 3, 1993.

ing unitary status in the KCMSD. The court found that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy, but the components have not yet met these goals in their entirety. The court's statements in its July 30, 1993 order, which the State referred to only most obliquely in the argument of the issues before us, substantiates our reading and interpretation of the orders heretofore entered by the district court.

The State next argues that even if we conclude (as we have) that the district court was not obligated to issue findings of fact regarding the success of the *Milliken II* programs, the district court abused its discretion when it held that the *Milliken II* programs were not unitary. The essence of the State's argument is that it complied fully and satisfactorily with all court orders, insofar as the remedial programs have been fully implemented and funded for a seven-year period. This, it argues, is the extent of its liability. We reject the State's argument that the District has achieved unitary status regarding the quality education offered its students.

The Supreme Court has twice in recent years considered the standards to be employed in determining whether a school system has become unitary.

First, in *Board of Education of Oklahoma City v. Dowell*, 111 S. Ct. 630, 636 (1991), the Supreme Court stated that in determining whether there was constitutional compliance in a school desegregation case, the district court "should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." *Id.* at 638. The Court itemized a number of facets of school operation that a court should consider in determining whether the vestiges of *de jure* segregation had been "eliminated as far as practicable," including "student assignments, . . . 'faculty, staff, transportation, extra-curricular activities and fa-

cilities.'" *Id.* (quoting *Green v. New Kent County School Bd.*, 391 U.S. 430, 435 (1968)).[8]

Second, in *Freeman v. Pitts*, the Court dealt specifically with whether a district court could withdraw incrementally from supervising a school desegregation case. The Court held that the Court of Appeals for the Eleventh Circuit erred in requiring retention of full remedial authority until a school district had achieved unitary status in all categories. 112 S. Ct. at 1446.

In discussing the meaning of "unitary," *Freeman* began with the basis for the court's exercise of equitable power. The Court stated:

> The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision. . . . "The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution." The requirement of a unitary school system must be implemented according to this prescription.

Id. at 1444 (citations omitted).

Freeman stressed that the end purpose of a court's supervision is to remedy the violation and then to restore to state and local authorities control of the school system. *Id.* at 1445. Partial relinquishment of judicial control can be a significant step in fulfilling the district court's duty to return the control of schools to local authorities. *Id.* "A transition phase in which control is relinquished in a gradual way is an appropriate means to this end." *Id.* The Court continued:

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[8] Another factor to be considered is the quality of education offered to the white and black students. *See Freeman*, 112 S. Ct. at 1437.

> [O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution.

Id.

Freeman authorizes a district court to relinquish control in stages, outlining the analysis it should follow and requiring careful articulation of its reasoning. The district court is given discretion based upon its assessment of many factors, some of which are most intangible:

> A court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power. Among the factors which must inform *the sound discretion* of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system, and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

Id. at 1446 (emphasis added).

In order to analyze this case under *Freeman v. Pitts* to determine if KCMSD has achieved unitary status, we must consider the constitutional injury, the methods selected to remedy that injury, the goals of the remedy, and the success achieved by the remedy.

Of course, the injury is that vestiges remain of the dual school system once required by the State of Missouri. Those vestiges take the form of reduced student achievement and white flight, resulting in the anomaly of a racially isolated school district in the midst of a population with a far different racial makeup. In *Jenkins II*, we quoted the district court's findings:

> "[W]itnesses confirmed the conclusion reached by the Supreme Court in *Brown I* [*Brown v. Board of Educ.*, 347 U.S. 483 (1954)] that forced segregation ruins attitudes and is inherently unequal .... The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty.""Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD."
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> ...
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> The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-59 school year, blacks constituted 22.5% of KCMSD enrollment, but by 1983-84 enrollment was 67.7% black and white enrollment had dropped 80%. "[A]s of 1974, 20 years after *Brown I*, 39 schools were more than 90% black .... Eighty percent of all blacks in the District attended schools that were 90% black...." KCMSD later reduced the number of over-90%-black-enrollment-schools, but the district court found in 1984 that KCMSD had still not completely dismantled the dual system.

855 F.2d at 1300 (citations omitted).

The remedy consisted of a capital improvements plan to rectify the decay in the school's physical facilities,[9] numerous quality education programs, and a far-reaching magnet school plan. The goals of the remedial programs were: (1) to compensate the victims by improving the education given them; (2) to enhance the programs so as to reverse the white flight pattern, winning back white students from private and suburban schools, and thus ending the racial isolation of the victims; and (3) to use the magnet schools as a way of bringing about voluntary redistribution of children within the KCMSD itself. *Id.* at 1302.

The substance of the State's argument is that the *Milliken II* quality education programs have been established successfully and are of superior quality to those programs offered in the suburban school districts and, therefore, that the goal of ameliorating inferior educational opportunities has been accomplished. The State presented Dr. Terrance Stewart, Assistant Commissioner of Education for the State of Missouri, as its witness with respect to the implementation of the *Milliken II* programs. The district court viewed his testimony as giving a glowing report of the success of the programs. However, the court made clear that the goal was to integrate the Kansas City, Missouri School District, and that the various programs were tools to be used to do so. The court rejected Dr. Stewart's argument that no goals had been achieved. It is also significant that the testimony of Dr. Stewart did no more than describe the successful establishment of the several educational programs, but gave no indication of whether these programs had succeeded in improving student achievement. On the other hand, KCMSD's Superintendent Walter Marks, and Assistant Superintendent of Instruction Art Rainwater, testified that while the programs had been established and progress was being made both in academic achievement and reduction of racial isolation, much remains to be done.

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[9] The capital improvements are not before us in this appeal. *But see Jenkins II*, 855 F.2d at 1300, 1306-07.

The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made. The evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable. *See Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638). These tests, articulated in *Dowell* and *Freeman*, answer the State's argument that establishment of the programs by compliance with the court order is all that is required.

Further, *Freeman* did not indicate that the State is entitled to be released upon accomplishment of any particular objective without also considering whether retention of judicial control was necessary or practicable to achieve compliance with the decree in other facets of the school system. The State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree. *See Freeman*, 112 S. Ct. at 1446; *see Brown v. Board of Educ.*, 978 F.2d 585, 592 (lOth Cir. 1992) ("[S]pecific policies, decisions, and courses of action that extend into the future must be examined to assess the [defendant's] good faith."), *cert. denied*, 113 S. Ct. 2994 (1993).

KCMSD argues that the State's evidence is insufficient to justify exercise of the court's discretion to grant unitary status under *Freeman*. KCMSD's argument has much merit, but the State asks only that we hold the district court abused its discretion in continuing the education programs.

We have considered the State's arguments in considerable detail, and we are satisfied that Judge Clark's comments during the four-day hearing show that he fully considered the State's *Freeman* arguments. In his order, he rejected funding for some of the programs, while granting the funds for others; thus, he implicitly rejected the State's *Freeman* arguments. While it might have been desirable for the court to articulate explicitly even a conclusory rejection of the State's *Freeman* arguments,

the district court did not abuse its discretion in continuing the quality education programs.

In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD has become unitary, a few further words are appropriate.[10] *Dowell* and *Freeman* both outline in considerable detail the nature of the inquiry the district court must undertake in considering this issue. These principles must be applied in analyzing the question of unitariness to determine whether there has been a successful remedy for the constitutional violations that have been found to exist in KCMSD. Our earlier opinions which we have discussed above, particularly *Jenkins II* and the district court orders there in issue, set forth in detail the constitutional violations and the impact upon the District. It goes without saying that careful factfinding and detailed articulation of findings will be required, particularly with respect to whether vestiges of discrimination have been eliminated to the extent practicable, and thus certain aspects of KCMSD have become unitary. It is evident that in considering the various parts of the remedy, some questions will be far more easily resolved than others. The improvement of the physical facilities is one that lends itself to relatively simple quantification. Questions of student assignments, faculty and staff composition, as well as extra-curricular activities and facilities, are only slightly more complicated.

When the question of quality of education is reached, however, the issue is far more complex. The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement,

[10] Another part of the remedy we have stressed repeatedly is the development of a voluntary inter-district plan. We observe once again that the only implementation of any such plan is the ten student exchange with the Missouri City schools.

have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools, and the orders of the district court reflect that it is aware of this fact.

We must also recognize that the funding problems are an inherent part of the entire problem in KCMSD, as we observed in *Jenkins II*, 855 F.2d at 1305. The atmosphere within the community and the legal climate within the State have prevented KCMSD from raising the necessary funds to maintain its schools and to fund remedial programs. These are all aspects that the district court must consider as it continues to address this issue in the future.

III.

The State also argues that the district court erred as a matter of law in approving salary increases for KCMSD employees in its order of June 25, 1992. Order of June 25, 1992 at 15-16. The State argues first that the salary increase remedy sought exceeded that necessary to remedy the constitutional violations, and alternatively, that if the district court had lawful authority to impose the increases, it abused its discretion in doing so. We reject the State's arguments and affirm the district court's June 25, 1992 order granting the salary increases.[11]

On September 15, 1987, the district court ordered salary increases to be paid out of the desegregation budget, finding that high quality personnel are necessary not only to implement specialized desegregation programs intended to improve educa-

[11] The salary increases called for in the court's order had been completely paid when argument was heard in this case. Presumably, the State would seek recovery of the funds from KCMSD, and whether there is a practical effect, in view of joint and several liability, is a question that we need not ponder.

tional opportunities and reduce racial isolation, but also to ensure that there is no diminution in the quality of its regular education programs. *Jenkins*, 672 F. Supp. 400, 410 (W.D. Mo. 1987), *aff'd in relevant part*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied as to relevant part*, 490 U.S. 1034 (1989). Additional increases to be paid from the desegregation budget were sought in 1990, and after several days of hearings in June of that year, the parties reached a settlement as to salary increases to be paid equally by the State and KCMSD, with KCMSD's fifty percent share to be funded by an increase in the real estate tax levy from $4 per $100 valuation to $4.96. The settlement specifically provided that joint and several liability would not apply to these salary obligations. The parties in this litigation did not appeal from the order, and this court dismissed an appeal filed by a group of taxpayers. *Jenkins v. Missouri*, 967 F.2d 1245, 1248 (8th Cir.) (property owners' notice of appeal was ineffective since they did not move to intervene until time to appeal had already expired), *cert. denied*, 113 S. Ct. 811 (1992).

In early 1992 the American Federation of Teachers and KCMSD sought additional increases in salaries to be paid as desegregation expenses. The State opposed the increases and argued that the court should order a roll-back of salaries of the KCMSD staff to the 1986-87 levels because the salary increases did not meet the goals set by the court.

After a hearing lasting four days, the district court entered its order approving the salary increases. Order of June 25, 1992 at 16. The court set forth in detail the respective contentions of the parties and supporting evidence and ordered the State to fund fifty percent of the increases and KCMSD to fund fifty percent, with joint and several liability. Most importantly in this order, the court found that Kansas City, Missouri is part of the national urban market, and that other cities are competing for Kansas City's teachers and staff. The district court found that the State's roll-back proposal would drastically impair implementation of

the desegregation remedy. Order of June 25, 1992 at 13. The district court concluded that logic and empirical data showed that in an absence of desegregation funding for salaries, the District would not be able to implement the desegregation plan. *Id.* at 12. Quoting *Freeman v. Pitts*, the court found that the "essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Id.* at 12 (quoting *Freeman v. Pitts*, 112 S. Ct. at 1444). The court referred to its ruling in 1989 that KCMSD's difficulty in hiring and retaining qualified personnel adversely affected the desegregation plan. *Id.* at 13 (citing Order of July 5, 1989 at 23). In approving the 1990 salary package, the court found that salary increases for KCMSD's personnel were "essential to comply with the [c]ourt's desegregation orders." Order of June 25, 1992 at 13 (quoting Order of July 23, 1990 at 6). The district court also referred to its earlier orders and decisions of this court that high quality personnel are necessary not only to implement specialized desegregation programs intended to improve educational opportunities and reduce racial isolation, but also to "insure that there is no diminution in the quality of its regular academic program." *Jenkins v. Missouri*, 672 F. Supp. at 410. The court found: "In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and staff." Order of June 25, 1992 at 15. Finally, the district court concluded that the basis for its ruling is grounded "in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD." *Id.*

The State makes no claim that the findings of fact of the district court are clearly erroneous. Instead, it simply argues that as a matter of law there is no support for the district court's order, and if there is such support, the district court abused its discretion in ordering the salary payments. In great part, the State seems to be urging that we review the issue de novo based upon factual

arguments that it now asserts, many based on evaluative criteria it claims the district court had adopted.

The State's legal argument is that the district court should have denied the salary increase funding because it is contrary to *Milliken II* and *Swann* in that it does not directly address and relate to the State's constitutional violation. The State argues that low teacher salaries do not flow from any earlier constitutional violations by the State. The State particularly targets pay of non-teacher personnel as beyond the power of the court to reach.

The State's argument requires that we look again to the finding, which we affirmed in *Jenkins II*, 855 F.2d at 1300, that "[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD" as well as departures of whites to private schools and suburbs. The goals of the remedial programs are to improve the educational lot of the victims of unconstitutional segregation, to regain some portion of the white students who have fled the District and retain those that are still there, and to redistribute the students within the KCMSD to achieve the maximum desegregation possible. 855 F.2d at 1302. The State has too narrow an approach to the nature of the constitutional violation and injury, which is extremely broad. *See* pages 17-18, *supra*. In addition to compensating the victims, the remedy in this case was also designed to reverse white flight by offering superior educational opportunities. *See Jenkins II*, 855 F.2d at 1302.

Contrary to the State's argument, the issue is not that low teacher pay in and of itself is a constitutional violation that must be remedied, but rather the systemic reduction of student achievement and white flight which require as part of the remedy quality education programs and magnet schools. This remedy finds its earliest support in *Milliken II*, which stated: "In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation .... [T]he decree ... must be designed

as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" 433 U.S. at 280 (citations omitted). *Milliken II* discussed educational remedies deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education provided in a non-discriminatory manner in a school system free from pervasive dejure racial segregation. *Id.* at 282. *Milliken II* specifically approved remedial education programs "to overcome past inadequacies and to compensate minority children for unequal educational opportunities resulting from past or present racial and ethnic isolation." *Id.* at 284-85. Indeed, *Milliken II* looked to habits of speech, conduct, and attitudes reflecting cultural isolation as conditions that the remedy could appropriately address. *Id.* at 287.

The establishment of the quality educational programs in KCMSD springs from these roots and from the ample findings that we have reviewed on numerous occasions.

To this beginning proposition we must then add the findings of the district court that salary funding is necessary to implement the desegregation plan. The court stated in its June 1992 order that "[l]ogic and empirical data show that in the absence of desegregation funding for salaries, the district will not be able to implement its segregation plan. " Order of June 25, 1992 at 12. It was particularly appropriate that in this same order the district court looked to the language in *Freeman v. Pitts* that "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action, " slip op. at 12 (quoting *Freeman*, 112 S. Ct. at 1444), and further that a district court may require the expenditure of funds to implement a desegregation remedy, slip op. at 12 (citing *Milliken II*). The court looked to its earlier holdings that KCMSD's difficulty in hiring and retaining qualified personnel adversely

affected the desegregation plan. Slip op. at 13. "High quality personnel are necessary not only to implement specialized desegregation programs intended to 'improve educational opportunities and reduce racial isolation,' but also to 'ensure that there is no diminution in the quality of its regular academic program.'" *Id.* at 13 (citing *Jenkins II*). The court also found that to improve the KCMSD's desegregative attractiveness, KCMSD must be able to hire and retain high quality teachers, administrators, and staff. Slip op. at 15.

What we have said, coupled with the district court's findings detailed above, demonstrates the legal basis for the court's salary orders. Further, as we said in discussing the decay of the district's physical facilities in *Jenkins II*, the constitutional violations by the State and failure to remove the vestiges of the dual school system "'contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools.'" 855 F.2d at 1305. The same principle applies equally to the salary issue before us. In *Jenkins II* we rejected an argument similar to that asserted by the State today. It is also significant that the district court, in its first order relating to salaries, specifically referred to the deterioration in KCMSD's teacher salary position because of failure to obtain passage of a tax levy. *Jenkins v. Missouri*, 672 F. Supp. at 410.

We reject the State's argument that the salary order entered by the district court was without lawful authority. We are satisfied that the district court's factual findings provide sufficient underpinning for the legal conclusion the district court reached in this case.

We need not engage in a detailed analysis of the State's factual arguments. There was substantial evidence to support the district court's findings we have referred to above. Further, the court heard testimony from the State's experts that there was a statistically significant, positive change in the turnover rates for full-

time employees after the earlier salary increase, that the percentage of certified employees selecting KCMSD dramatically increased because of the earlier salary increases, that the percentage of employees lost to other school districts after the salary increase declined significantly, and that the average performance evaluation for the professional employees increased positively and significantly. The record provides ample support for the district court's findings, and we conclude that it did not abuse its discretion in approving the salary increases.

We affirm the various orders entered by the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3274

Kalima Jenkins, by her friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M.

Williams, Member of the Missouri State Board of Education; Jacqueline Wellington, Member of the Missouri State Board of Education,
Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 3, 1993
Filed: December 8, 1993

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.
JOHN R. GIBSON, Circuit Judge.

The State of Missouri once again appeals from orders of the district court[1] granting salary increases to KCMSD personnel as part of the remedy in the ongoing Kansas City school desegregation case. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. June 30 and July 30, 1993). We affirm.

We have in our most recent opinion affirmed salary orders entered by the district court on June 25, 1992. *Jenkins v. Missouri*, No. 90-2238 (8th Cir. Nov. 29, 1993). In our opinion we outlined the history of the court's orders dealing specifically with salaries as a part of the desegregation remedy, including the original salary order of September 15, 1987, and a settlement reached by the parties in 1990, and finally, the affirmance of the

[1]The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

1992 order. We need not repeat that history which is set out in our earlier opinion. Slip op. at 21-27. Additional hearings were held on salary motions for the school years 1993-94, 1994-95, and 1995-96, and the district court in an order dated June 30, 1993 granted salary increases to be effective in the three school years.

I.

The State first argues that the district court should have denied the salary increase funding, as it is contrary to *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), in that it does not directly address and relate to the constitutional violation. The State argues that low teacher salaries do not flow from any earlier constitutional violations by the State, and therefore violate *Milliken II*, as well as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), requiring the remedial steps be carefully tailored to correct the vestiges of prior desegregation and no more. The State particularly targets pay of non-teacher personnel as not flowing from constitutional violations by the State, and beyond the power of the court to reach.

We have rejected the same arguments with respect to the 1992-93 salary funding order. *See Jenkins v. Missouri*, No. 90-2238, slip op. at 21-27 (8th Cir. Nov. 29, 1993). We reasoned that quality education programs and magnet schools were a part of the remedy for the vestiges of segregation causing a system wide reduction in student achievement in the KCMSD schools. *Id.* at 24-26. Further, we pointed to the district court's findings that the failure to remove the vestiges of the dual school system precipitated an atmosphere which prevented KCMSD from raising necessary funds, specifically those to maintain required salary levels. *Id.* at 26-27. It is significant that in its order for the earlier year the district court underscored the language from *Freeman v. Pitts*, 112 S. Ct. 1430, 1444 (1992), that "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." Order of June 25, 1992 at 12. The significant finding of the court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation orders, and that high quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of KCMSD.

We reject the State's argument that the salary order is contrary to *Milliken II* and *Swann*.

II.

The State next argues that the district court's finding that KCMSD competes in a national urban market for teachers is clearly erroneous. We first observe that this is an argument that the State did not make with respect to this same finding in the June 1992 district court order. The essence of the State's argument is that it presented four witnesses on the issue of the national urban market, that there was and is no national urban market from which school districts compete for staff in any significant fashion, and even if there was, KCMSD does not compete in it.

We have said on numerous occasions, particularly in school desegregation cases, we give great deference to the factual findings of the district court, and reverse only if clearly erroneous, under the standards set forth in *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The litigation before us dates back to 1977, with Judge Clark presiding over the case during the entire period. We traced this history in *Jenkins v. Missouri*, 807 F.2d 657, 661-62 (8th Cir. 1986) (*Jenkins I*), *cert. denied*, 484 U.S. 816 (1987), and on numerous occasions since that time we have updated the long chronology. Contrary to the State's arguments, there was substantial evidence that the District actively recruits and competes for teachers on a nationwide basis. In 1991 and 1992 KCMSD representatives traveled to New Mexico, North Carolina, Texas, Florida, Wisconsin, Arizona, Colorado, Michi-

gan, New Jersey, Ohio, and New York to recruit qualified teachers. In addition, they advertise in numerous journals on a nationwide basis. Both Superintendent Marks and AFT witness Gould testified about the difficulty in recruiting teachers to work in urban school districts.

The evidence introduced was sufficient to support the district court's findings that there was a national urban market. Even the testimony offered by the State tended to confirm this fact. The State's witnesses, though they stated they knew of no national market, conceded that their own school districts did at least some nationwide recruiting.

The record provides abundant support for the district court's finding and only ambiguous evidence detracting from it. This record in no way inspires a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. at 573. Therefore, we may not disturb the district court's finding.

III.

Finally, the State argues that the court abused its discretion in approving the salary increases even if pay raises for some KCMSD employees are permissible. The State contends that the district court abused its discretion when it did not properly assess the results based on evaluative criteria the court had approved earlier, that the expert testimony provided by AFT and KCMSD failed to show that the salary increases had a positive effect on the quality of the KCMSD staff, and that the court had no basis for its finding that the non-teacher personnel were entitled to salary increases. The district court first found that because the salary increases are a necessary component of the desegregation program, the court only needed to determine the extent to which a raise would be appropriate. The district court then conducted a detailed analysis of the proposals submitted by the three

parties. Our analysis of the district court's careful factfinding demonstrates that it did not abuse its discretion.

In its proposal to the district court, the State argued that only certain of the instructional personnel should receive a one percent plus $400 increase for fiscal year 1994. The State, in essence, asked the court to freeze salaries at fiscal year 1993 levels for the other teachers and the rest of the personnel in the KCMSD. The State has failed to give, either to the district court or to us in this appeal, any clear basis for differentiating between that group of teachers who would be entitled to a raise and those who would not. The district court rejected the State's proposal, stating that the State had failed to submit a serious proposal and that the State's plan was "not consistent with the meaningful implementation of the desegregation program." Order of June 30, 1993 at 4. Viewing the State's proposals as "little or no benefit" to crafting a desegregation remedy, the court pointed to the legislature's failure to pass legislation which would enable the KCMSD to fund its share of desegregation expenses. *Id.* at 4-5. The district court then carefully weighed the proposals made by the AFT and KCMSD, and concluded that because resources were not available to fund the AFT plan, the court could not implement AFT's suggestions. *Id.* at 5. The court also referred to its earlier adoption of a less expensive proposal with respect to the Long Range Magnet Plan as evidence that the cost savings there would be used to the benefit of the desegregation program and help facilitate KCMSD's ability to fund salary increases. *Id.* at 8. We have observed in numerous orders appealed to us that the district court has juridically pruned applications of funding that have been presented to it. We are convinced that the district court's detailed analysis demonstrates a careful exercise of discretion and prevents any conclusion that it abused this discretion.

The State also argues that the district court abused its discretion in not considering the evaluative criteria the court had earlier

endorsed and approved, and that the salary increase has not changed the basic pattern of hiring or departures in the District. In a sense, the essence of the State's argument is that the district court should have accepted the testimony of its witnesses in this respect, a proposition we have on two occasions in this long litigation rejected. *See Jenkins v. Missouri*, 942 F.2d 487, 490-91 (8th Cir. 1991), and *Jenkins v. Missouri*, 965 F.2d 654, 657 (8th Cir. 1992). It is enough to say that the district court recognized and rejected these specific arguments in its June 1992 order. Order of June 25, 1992 at 9-11, 15. In the order before us, the court clearly stated that it declined to make a different ruling on substantially unchanged evidence. Order of June 30, 1993 at 2. It is evident that the district court had before it substantial evidence of a statistically significant reduction in the turnover rates for full-time employees, a dramatic increase in the percentage of certified employees selecting KCMSD because of the salary increases, and a significant decline in the number of employees lost to other districts. Further, the court heard testimony that the average performance evaluation for the professional employees increased positively and significantly.

The State also disputes the two percent per year pay increase the court granted to certain non-teacher personnel, and 2.5 percent per year pay increase to the remaining group, including maintenance workers, cooks and the like. We have already discussed the court's finding that salary increases for KCMSD's personnel were essential to comply with the court's desegregation order. Order of June 25, 1992 at 15. To improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators, and staff. *Id.* In the June 1993 order, the district court reiterated that the salaries of KCMSD personnel are appropriately considered a desegregation expense. Order of June 30, 1993 at 2. It made specific findings with respect to the two percent per year increase for administrators and non-represented employees, and with

respect to the operating, warehouse, maintenance, mail room and food service employees, and stated that the evidence reaffirmed that support personnel are critical to the successful implementation of the desegregation program. *Id.* at 12. These findings are not shown to be clearly erroneous, and are a sufficient basis to support the court's finding with respect to salary increases for those personnel, and accordingly, the district court did not abuse its discretion in ordering these increases.

We believe that the court did not abuse its discretion in the June 1993 order. It is evident that in considering the salary proposal now before us, the district court carefully analyzed the positions of the three parties, threaded its way through conflicting evidence, made findings of fact, and accepted the proposals it considered the best for the desegregation remedy of KCMSD. In addition, the district court has not hesitated to reject requests for funding that it determined were not appropriate. Finally, as we have observed in our latest opinion, the district court has requested submissions for funding proposals based on alternative phaseout periods of three, five, seven, or ten years. Thus, all of its careful analysis leads to the inescapable conclusion that the court is completely aware of not only the full scope but also the particular details in the desegregation remedy, and that it is anticipating the day when it may declare certain portions of the program unitary. The district court did not abuse its discretion in the June 1993 order.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2238
No. 91-3636

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Plaintiffs,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley; Dan L. Blackwell; Gary M. Cunningham; Raymond McCallister, Jr.; Susan D. Finke; Thomas R. Davis; Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,
Defendants-Appellants,

School District of Kansas City, Missouri
Claude C. Perkins, Superintendent thereof,
Defendants-Appellees.

No. 92-3194
No. 92-3200

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook,

Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

No. 93-3274

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

American Federation of Teachers, Local 691,

Intervenor-Appellee,

v.

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member

of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Filed: February 24, 1994

ORDER

The petition for rehearing by the panel is denied. The panel of its own motion substitutes pages 17 and 20 attached hereto for the respective pages in the original opinion filed November 29, 1993.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Page 17]

> with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

Id. at 1446 (emphasis added).

In order to analyze this case under *Freeman v. Pitts* to determine if KCMSD has achieved unitary status, we must consider the constitutional injury, the methods selected to remedy that injury, the goals of the remedy, and the success achieved by the remedy in eliminating the vestiges of the constitutional violations to the extent practicable.

Of course, the injury is that vestiges remain of the dual school system once required by the State of Missouri. Those vestiges take the form of reduced student achievement and white flight, resulting in the anomaly of a racially isolated school district in the midst of a population with a far different racial makeup. In *Jenkins II*, we quoted the district court's findings:

> "[W]itnesses confirmed the conclusion reached by the Supreme Court in *Brown I* [*Brown v. Board of Educ.*, 347 U.S. 483 (1954)] that forced segregation ruins attitudes and is inherently unequal .... The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty.""Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD."

...

> The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-

[Page 20]

KCMSD argues that the State's evidence is insufficient to justify exercise of the court's discretion to grant unitary status under *Freeman*. KCMSD's argument has much merit, but the State asks only that we hold the district court abused its discretion in continuing the education programs.

We have considered the State's arguments in considerable detail, and we are satisfied that Judge Clark's comments during the four-day hearing show that he fully considered the State's *Freeman* arguments. In his order, he rejected funding for some of the programs, while granting the funds for others; thus, he implicitly rejected the State's *Freeman* arguments. While it might have been desirable for the court to articulate explicitly even a conclusory rejection of the State's *Freeman* arguments, the district court did not abuse its discretion in continuing the quality education programs.

In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD has become unitary, a few further words are appropriate.[10] *Dowell* and *Freeman* both outline in considerable detail the nature of the inquiry the district court must undertake in considering this issue. These principles must be applied in analyzing

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[10] Another part of the remedy we have stressed repeatedly is the development of a voluntary inter-district plan. We observe once again that the only implementation of any such plan is the ten student exchange with the Missouri City schools.

the question of unitariness, and in determining the success of the remedy in eliminating the vestiges of the constitutional violations found to exist in KCMSD to the extent practicable. Our earlier opinions which we have discussed above, particularly *Jenkins II* and the district court orders there in issue, set forth in detail the constitutional violations and the impact upon the District. It goes without saying that careful factfinding and detailed articulation of findings will be required, particularly with respect to whether vestiges of discrimination

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2238

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

American Federation of Teachers, Local 691,

Plaintiffs,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley; Dan L. Blackwell; Gary M. Cunningham; Raymond McCallister, Jr.; Susan D. Finke; Thomas R. Davis; Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,

Defendants-Appellants,

School District of Kansas City, Missouri
Claude C. Perkins, Superintendent thereof,
Defendants-Appellees.

No. 91-3636

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Member of the Missouri State Board of Education; Susan D. Finke, Member of the Missouri State Board of Education; Thomas R. Davis, presiding President, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams,

Member of the Missouri State Board of Education;
Jacquelline Wellington, Member of the Missouri State Board of Education,
Defendants-Appellants,

School District of Kansas City, Missouri;
Walter L. Marks, Superintendent thereof,
Defendants-Appellees.

No. 92-3194
No. 92-3200

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American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member

of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

No. 93-3274

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

American Federation of Teachers, Local 691,

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State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Filed: March 15, 1994

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER

The suggestion for rehearing en banc is denied. Judges Bowman, Wollman, Beam, Loken, and Morris Sheppard Arnold would grant the suggestion.

JOHN R. GIBSON, Senior Circuit Judge, concurring in the denial of rehearing en banc, joined by McMILLIAN and MAGILL, Circuit Judges.

The dissent to the denial for rehearing en banc would now rehear the ninth decision of this court dealing with the intradistrict remedy for the constitutional violations in the Kansas City, Missouri School District. Its willingness to do so is based on a misperception of the issues in this case and a highly selective reading of the record before the district court.

The dissent accepts, at least in part, the State's argument that the district court adopted a student achievement goal, measured by test scores, as the only basis for determining whether past discrimination has been remedied. The dissent develops this argument at length by examining the testimony of several witnesses. Certainly, Dr. Marks and Dr. Rainwater referred to student achievement test results, but their testimony covered a far broader spectrum. When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered. Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's

* The Honorable John R. Gibson was an active judge of this court when the suggestion for rehearing en banc was filed and took senior status on January 1, 1994, before this order was filed.

claim that its obligation for the quality education programs should be ended by a declaration they are unitary.

The Kansas City school desegregation litigation does not deal with "pedagogical sociology," *see* dissent, slip op. at 16, but rather the remedy for the constitutional violations and injuries, uncontested if not admitted, that we summarized in *Jenkins v. Missouri*, 949 F.2d 1052, 1057 (8th Cir. 1991) (*Jenkins VII*):

> The ultimate issue in this case, as it has been over the years, is remedying serious and pervasive constitutional violations. [*Jenkins v. Missouri*] *Jenkins II*, 855 F.2d [1295] at 1300 (quoting *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984) ("the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District") and *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. 1985) ("Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD"). . . .

Few of the school desegregation cases have attempted to remedy as difficult an injury as "a system wide reduction in student achievement" caused by discrimination against black students. A quality of education program was part of the desegregation plan in DeKalb County, Georgia, which was before the Supreme Court in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). Justice Kennedy there referred to the "more ineffable category of quality of education." *Id*. at 1441. The district court's treatment of comparative test results in *Freeman* and its holding that the district had not achieved unitary status with respect to quality of education programs was noted by the Supreme Court, *id.* at 1441-42, and the parties did not challenge this part of the order. *Id.* at 1446. Thus, the *Milliken II*[1] quality education components of the district court's decree remain in effect.

[1] *Milliken v. Bradley*, 433 U.S. 267 (1977).

While the dissent argues that no particular level of education is guaranteed by the Constitution, the Constitution does require, as articulated again in *Freeman*, that the vestiges of discrimination be eliminated to the extent practicable. *See* 112 S. Ct. at 1448. Applying this test to the system wide reduction in student achievement, of a widespread and long-standing nature, is the task to which the district court addressed itself.

The dissent demolishes a strawman of a one-hundred year remedy. These words were those of the State's lawyer in a leading question, with which Dr. Rainwater agreed. The district court nowhere mentions this exchange. To the contrary, as the panel recognized, the district court called for submission of alternative plans phasing out court-ordered funding in three, five, seven or ten years. The dissent raises numerous other issues that should be answered, but reference to the panel's opinion is sufficient for this purpose.

We have in our earlier decisions observed that "[t]he choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Jenkins v. Missouri* (*Jenkins II*), 855 F.2d 1295, 1299 (8th Cir. 1989) (quoting *United States v. Paradise*, 480 U.S. 149 (1987), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990). The significance of the district court's analysis is underscored by *Freeman*, 112 S. Ct. at 1445-46, which discussed the district court's discretion to order an incremental withdrawal.

The reasons advanced by the dissent do not justify rehearing en banc.

BEAM, Circuit Judge, dissenting from the denial of rehearing en banc, joined by BOWMAN, WOLLMAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

The court, with a vote of six nays and five yeas, denies en banc consideration of orders of the district court dealing, in part, with

court ordered pay raises for employees of the Kansas City, Missouri School District (KCMSD) and with the partial unitary status of the school district. I dissent.

I.

The de jure racial segregation of the KCMSD has been before the same United States District Judge for the Western District of Missouri since 1977. In that year, "the KCMSD implemented a desegregation plan," which reassigned African-American (minority) and European-American (majority) students within the district and which was designed to effect "a minimum of 30% minority enrollment . . . in every KCMSD school." *Jenkins v. Missouri*, 639 F. Supp. 19, 35 (W.D. Mo. 1985). Minority students from schools with a large minority enrollment were moved to schools with a large majority enrollment and vice versa. School boundary lines were changed, attendance zones created and more than 16,000 KCMSD students had their school assignments changed. *Id.* at 35-36. In 1979-1980, the United States Office of Civil Rights classified the KCMSD as being "in compliance" with federal requirements of school desegregation under Title VI of the Civil Rights Act of 1964. *Id.* at 36.

Between 1977 and 1985 the KCMSD majority enrollment decreased by more than forty-four percent while minority enrollment decreased by only thirty percent. *Id.* By 1985, nineteen of the fifty elementary schools in the KCMSD had enrollments of ninety percent or more minority students. *Id.* Tax collections were on the decline and school financing plans were failing at the ballot box. "White flight" to private schools and to the suburbs was rampant.

The district court, correctly recognizing that at least part of this problem was the consequence of the de jure segregation previously practiced under Missouri constitutional and statutory law, fashioned a remedial plan for the desegregation of the KCMSD and for "the elimination of all vestiges of state imposed

segregation." *Id.* at 23. This laudable goal was in accordance with the requirements of *Green v. County School Board*, 391 U.S. 430 (1968). "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Id.* at 436. School boards were charged in *Green* with taking all necessary steps to convert to unitary systems in which racial discrimination would be eliminated "root and branch." *Id.* at 438.

Although the district court deemed the KCMSD and the state liable for the results of past racial discrimination, the court found that the suburban school districts (SSDs) surrounding Kansas City were not guilty of constitutional wrongs requiring them to participate in a court imposed remedy. This holding was affirmed by this court, en banc, in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*Jenkins I*), *cert. denied*, 486 U.S. 816 (1987). The nonliability of the SSDs presented at least one obvious remedial problem; specifically, the minority students in the KCMSD could not be intermixed by court order with the majority students in the suburbs. With this restriction in mind, the district court fashioned an aggressive and far reaching remedial plan binding only on the KCMSD. Some observers have described it as the most ambitious and expensive remedial program in the history of school desegregation.

The district court concluded that segregation had caused, among other things, "a systemwide *reduction* in student achievement." *Jenkins*, 639 F. Supp. at 24 (emphasis in original). This reduction in achievement, together with the deterioration in physical facilities, health concerns, safety concerns, comfort concerns and inadequate funding of all educational activities, had, at least in part, caused the "white flight" noted earlier. Thus, the district court imposed a remedy broadly designed (1) to attract majority students to KCMSD schools in order to provide minority students with a multiracial educational experience and (2) to provide a high-quality educational program, whether or

not a significantly desegregated school population was ever achieved.

A general outline of the remedy, affirmed with some modifications by this court, is as follows:[2]

> (1) A court imposed taxation plan on the citizens of Kansas City, Missouri, for school purposes.
>
> (2) Joint and several liability between the state and the KCMSD that required the state to provide substantial remedial funds including fund shares otherwise imposed upon the KCMSD for which no local monies were immediately available.
>
> (3) A system of magnet schools with educational themes designed to attract majority students away from the suburbs and the private schools to which they had fled and to expand the educational opportunities for all students.
>
> (4) An educational program aimed at "results more in keeping with national norms," *Jenkins*, 639 F. Supp. at 24, with reading skills at such national norms to be achieved within four or five years. *Id.* The educational program was to include:
>
> > (a) An annual evaluation rating of AAA, the highest classification awarded by the Missouri State Department of Elementary and Secondary Education, for all KCMSD schools. (All SSDs were and presently are AAA rated. At the time of the remedial order, the KCMSD was rated AA)
> >
> > (b) Reduction of class sizes to levels below those required for the AAA rating.

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[2] Specific details of the remedial plan are set forth in *Jenkins v. State of Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985) and our in en banc opinion in *Jenkins I*, 807 F.2d 657 (8th Cir. 1986).

(c) Extensive library improvements through improved media and library resources and through the hiring of at least twenty-two new librarians, thirteen of whom are certified for elementary schools.

(d) A system-wide computer education program with state-of-the-art automation equipment and highly skilled instructors.

(e) A reduced teaching load for all teachers and an improved curriculum with "additional art, physical education and music programs with specialty teachers.

(f) Additional school counselors to begin service at the elementary level and to reduce the workload of existing counselors at the secondary level to one full time counselor for each 390 students or fraction thereof.

(g) A summer school program providing remedial and developmental learning experiences, reinforcement and enrichment instruction and a "desegregative learning experience." *Id.* at 31.

(h) A full day kindergarten program in all elementary schools in the district.

(i) An extended day program including before and after school tutoring.

(j) An extensive early childhood development program.

(5) An "effective schools" program designed to accomplish changes in the KCMSD from the "bottom up." This program involves money for special programs developed by staff, parents, patrons, administrators, principals, teachers and students. *Id.* at 33.

(6) Staff development through special training in the principles and goals of the desegregation plan, implementation of effective instructional programs, effective information transmission, imposition of equitable discipline, solving transportation problems, use of school and community resources, and the law applicable to school desegregation.

(7) A mandatory student reassignment study costing not over $175,000.

(8) A voluntary interdistrict (KCMSD and SSD) transfer program.

(9) District-wide capital improvements.

(10) A separate desegregation plan administration.

(11) A desegregation monitoring committee.

(12) A new salary schedule designed to enhance the pay of all teachers and administrators and to aid in the recruitment and retention of staff at all levels and areas of responsibility.

The plan, very broadly outlined above, was implemented for the 1985-1986 school year. It has been ongoing and evolving since that time.

For the eight school years under the remedy, 1985-1986 through 1992-1993, the total KCMSD/state expenditures *for the desegregation plan alone* has been in excess of $902,473,047 and is escalating.[3] The KCMSD also apparently spends approxi-

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[3] The state contends in its petition for rehearing en banc that the cost to date specifically attributable to the desegregation remedy has been in excess of $1.2 billion dollars of which more than $250,000,000 has been spent to develop and maintain the educational programs. Petition for Rehearing at 5. This overall cost figure may be correct although I cannot tell from the

(Footnote 3 continued on next page)

mately two additional local, state or federal dollars on its school system beyond each dollar spent for the desegregation plan.[4] The annual per capita costs of the KCMSD far exceed those of the SSDs. I have compared the per-pupil cost for the year 1991-1992 (the only year readily available to me) for the KCMSD and for each SSD. With capital costs included, the per-pupil costs in the SSDs ranged from a low of $4,192 to a high of $7,488. KCMSD costs per pupil, by comparison, were $13,500. The SSDs operating costs (excluding capital costs) fell between $2,854 and $5,956 per student. The KCMSD spent $9,412 per student. With this for background, I turn to the present dispute.

II.

The state now seeks en banc consideration of parts of four orders of the district court and objects, specifically, to two facets of the district court rulings: (1) an order of June 30, 1993, granting additional salary increases to all employees of the

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(Footnote 3 continued)

evidence reasonably available to me at this time. The $250,000,000 program cost estimate is clearly low if it is intended to include all expenses except those connected with capital improvements. My estimate is derived from management audits in the annual reports of the desegregation monitoring committee that contain desegregation plan costs for the school years 1985-1986 through 1989-1990 and from recent figures the parties supplied to the panel that include expenditures for the school years 1990-1991 through 1992-1993. There may be additional state and federal desegregation dollars being spent outside the framework of the court-imposed plan. For the eight years for which audits and other figures are reasonably available, at least 902,473,047 total desegregation dollars have been spent as of July 31, 1993, of which at least $405,463,357 has been spent on capital improvements.

[4]My conclusion in this regard is, admittedly, based on limited information. In 1991-1992, the total KCMSD expenditure per pupil per year, including capital costs, was $13,500. The same year there were 36,349 students in the system. The 1991-1992 desegregation plan cost was $159,948,057.09 and the total school operation cost ($13,500 x 36,349 students) was $490,711,500.

KCMSD and (2) the district court's denial of partial unitary status of the KCMSD through the order of June 17, 1992.

A.

The state contends, and I agree, that federal court orders in school desegregation cases must directly address the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (*Milliken II*). An examination of the record supports the state's contention that further blanket wage increases will not directly enhance the educational program of the KCMSD. It should be noted that since 1985-1986, the court plan has required a competitive, if not generous, pay scale in the KCMSD. Thus, in my view, the current effort by the KCMSD and the American Federation of Teachers (AFT), aided by the plaintiffs, to bypass the collective bargaining process is uncalled for and is probably not an exercise reasonably related to the constitutional violations found by the court in 1985. Further, it enables the KCMSD to involve the state, via the joint and several liability holdings of the court, in pay raises the KCMSD probably could not impose upon its constituents. The court's salary order also enables the teachers' union to achieve goals that would be unattainable under the bargaining process.

Even so, I am willing to give the district court, and the panel, the benefit of the doubt with regard to wage increases for teaching and direct educational support personnel. The salary order affirmed by the panel, however, goes well beyond pay increases for these groups of KCMSD employees. I agree with the state that logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations. In my view, the panel was wrong in affirming this portion of the salary order.

B.

In early 1992, the KCMSD presented to the district court its proposed budget for year VIII of the desegregation plan. The state, in response, lodged numerous budgetary objections and contended that, under the holding in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), the KCMSD had achieved partial unitary status in the "high-quality educational program" (the *Milliken II* programs) prong of the remedial order. The district court conducted an evidentiary hearing on both the state's budget complaints and its partial unitary status contention on May 27-28, 1992. On June 17, 1992, the district court entered an order approving a year VIII budget and directing the KCMSD to submit a "Long Range Magnet Plan." Order of June 17, 1992. The court made no findings on the unitary status of the KCMSD and the state appealed the court's failure to address the issue.

Whether the KCMSD has actually achieved partial unitary status in the quality of its educational program imposed by the desegregation plan is, perhaps, still an open question on the record before us today. Even so, the standard adopted by the district court and by the panel to evaluate this question misreads *Freeman* and creates a hurdle to the withdrawal of judicial intervention from public education that has no support in the law. The district court has, with the approbation of the panel, imbedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high-quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard.

Although the district court has not yet visited the unitary status question with the diligence it deserves, three orders subsequent to the June 17, 1992, order enlightened the panel regarding the court's analysis. First, on April 16, 1993, after additional hearings and ten months after the contested order, the court approved, in part, additional funding for magnet schools and directed the

KCMSD to submit further financing proposals. As part of this order, the court found that while the educational opportunities afforded in the magnet schools are better than those previously available and the magnet school plan has successfully gained the interest of a substantial pool of majority students in attending KCMSD schools, the KCMSD cannot be declared partially unitary because academic achievement is still at or below national norms for many grade levels. Order of April 16, 1993, at 9-13. Second, on June 30, 1993, after a hearing held on June 1-3, 1993, the district court entered the contested salary order. Finally, insofar as the petition for rehearing is concerned, the court entered an order on July 30, 1993, which states in part: "[t]he Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time." Order of July 30, 1993, at 4. A July 7, 1993, hearing predated this order.

In affirming the district court's June 17, 1992, implied denial of partial unitary status, the panel refers to evidence received at the May 1992 hearing as well as to a statement on the goal of the desegregation remedy made by the district court during that hearing. In this regard, the district court said: "'[t]he [c]ourt's goal was to integrate the Kansas City, Missouri, School District . . . and all these [*Milliken II*] matters were elements to be used to try to integrate the [KCMSD] . . . . That's the goal. And a high standard of quality education.'" *Jenkins v. Missouri*, 11 F.3d 755, 761 (8th Cir. 1993) (quoting the district court).

My examination of the record reveals no evidence directly relevant to the issue of unitary status other than that adduced at the May 1992 hearing. The panel, however, in responding to the state's contention that the district court erred, as a matter of law, in failing to rule on the *Freeman* issue in the June 17, 1992, order, relies on conclusory and fact finding portions of the April 16, 1993, order and, of course, on the district court's specific ruling on July 30, 1993. The meager record on appeal that the panel was forced to assemble from these disjointed parts only complicated the panel's attempt to engage in its own *Freeman* analysis.

When the district court referred to academic achievement "below national norms" in its April 16, 1993, order, the information came directly from the May 27, 1992, testimony of Arthur Rainwater, Associate Superintendent for Instruction of the KCMSD, given during the hearing on the Year VIII budget plan and the state's request for partial unitary status. The data before the court showed that at the beginning of the seventh year of the remedy, comparing similar tests administered at each grade level K through 12, in the same month of the year in 1985 and 1991, individual student achievement in the KCMSD remained below the "national norm," at grades 4 and up, except in one subject in one grade. Joint Appendix A, Vol. VII at 1495. Achievement also remained under the national norm in some subjects in the earlier grades. *Id.*

So, indeed, the district court was justified in finding that academic improvement in the seven years since the program began had been less than dramatic. It is this April 16 finding of fact that the panel appears to find sufficient to affirm the denial of partial unitary status. But, student achievement does not set the constitutional standard for determining partial unitary status.

The appellees, in their response to the state's petition for rehearing, contend that the panel did not rely on a student achievement standard in affirming the district court. The words "achievement test results" or even "test results," so say the appellees, "are nowhere to be found in the panel decision" Response at 7. This argument, in my view, is disingenuous. The panel affirmed the district court. The district court obviously relied upon test scores below the national norm as the basis for its ruling. The district court, by its own statement, "[h]as gone to great lengths to provide the KCMSD with facilities and opportunities *not available* anywhere else in the country." Order of July 30, 1993, at 6 (emphasis added). And, as noted by the panel, the district court has adopted a goal that includes the "integrat[ion of] the Kansas City, Missouri School District . . . *[a]nd a high*

standard of quality education." *Jenkins*, 11 F.3d at 761 (citing the district court's comments at the May 1992 hearing). The only factor the district court saw standing in the way of unitary status for the educational program was continued below average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the educational enhancement (*Milliken II*) program of the KCMSD is wanting. Let's examine the facts.

Dr. Terrance Stewart of the Missouri Department of Elementary and Secondary Education has been directly involved in the development and implementation of the KCMSD remedy since September of 1984. He testified without dispute at the May 1992 hearing that the KCMSD was awarded the AAA rating in the 1987-1988 school year and since that time has "maintained and greatly exceeded AAA requirements." Joint Appendix A, Vol. V at 1008. Keeping in mind the fact that at the commencement of the remedial plan, school quality equal to that of the SSDs was a major goal, Dr. Stewart testified that "Kansas City School District [now] exceeds what's available in all the suburban school districts in almost every area of classification that we looked at." *Id.* at 1012. The state then, through Dr. Stewart, discussed each of the *Milliken II* programs ordered by the district court in 1985, including, but not limited to magnet schools, reduced class size, improved library and computer programs, lower pupil-teacher ratios, full day kindergarten, extended day school, summer school, early childhood education and capital improvements. In every instance, the enhancement of resources and program improvements ordered by the district court had been implemented and were in place no later than the 1988-1989 school year. Most of them predated that school year. Joint Appendix A, Vol. V at 995-1048.

Dr. Walter Marks, Superintendent of the KCMSD, also testified with regard to "appropriate buildings . . . equipping th[e] buildings with proper teaching equipment, furniture and every-

thing that goes into a building." Joint Appendix A, Vol. IV at 560. According to Dr. Marks, progress "has been fast, it has been pretty comprehensive; and in my judgment it has been well done." *Id.* However, Dr. Marks testified that the desegregation plan will not be fully implemented until "every school [in] ... the District [has reached] the national norm, the 50th percentile" in student achievement as measured by the testing process. *Id.* at 615.

Finally, Arthur Rainwater testified at length on the specific successes and failures in student achievement. He concluded that the purpose of the remedial plan "was to achieve desegregation and to change the levels of achievement in th[e] District." He further testified:

> Q. Is it your contention that until those desegregation and achievement levels are met that the remedial plan must continue?
>
> A. Yes. That would be my understanding.
>
> Q. Regardless of how many years it would take?
>
> A. Regardless of how many years it would take.
>
> Q. Even 100 years?
>
> A. Regardless of how many years.

Id. at 701. *Id.* at 159.

Regardless of whether the panel used the exact words "achievement test results" or "test results" it is abundantly clear that the panel felt that student achievement, or lack thereof, was the watermark up to which the tide of desegregation effort must flow. The panel said: "[t]he success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation." *Jenkins*, 11 F.3d at 766. The only measurement found anywhere

in the evidentiary record is the "achievement test results" which the district court refers to in the order of April 16, 1993. Thus, the state is correct in contending that the panel applied an achievement test standard.

There is no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination and represented "vestiges" of past unlawful segregation. The plan for a high-quality educational program was designed to: (1) attract nonminority students to the KCMSD system, (2) provide all KCMSD students with current and ongoing educational experiences equal to those available in the suburban school districts and (3) reverse the "reduction" in student achievement brought on by segregation and, in this way, remove the vestiges of past racial discrimination. I do not question these goals. The appropriate question now is, have some or all of the goals been met when the proper test is applied?

Education, generally, is not among the rights afforded explicit protection under the Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). And, although the Constitution forbids schools from operating in a racially discriminatory fashion, *Swann v. Charlotte-Mecklenburg Board of Education* disclaims any right to "any particular degree of racial balance or mixing." 402 U.S. 1, 24 (1971). Thus, by analogy, it seems clear that a victim of discrimination is guaranteed an equal opportunity in a high-quality educational program, but not a specific level of educational achievement under any set of conditions.[5]

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[5] Although the magnet schools and several other innovative programs are part of the enhanced educational system in the KCMSD and are part of the calculus which must now be considered in deciding unitary status in this case, I do not agree that the novel and expensive undertakings in Kansas City are a necessary part of a constitutionally sufficient effort, even one designed to eradicate the vestiges of discrimination. While *Milliken II* validated compensatory and remedial programs designed to, over time, free a public school

(Footnote 5 continued on next page)

To require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control. Segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement, if they exist in the KCMSD, are not the responsibility of the public school system.

For example, in Omaha, Nebraska, a city in which the school district has now been declared unitary after a period of operation under a court enforced remedial program, a gap in mathematic achievement between minority and majority eighth graders has been discovered. At a recent meeting on the problem, Mary Dean Harvey, Director of the Nebraska Department of Social Services stated: "If any plan to close the mathematics proficiency gap [in Omaha] is to succeed, . . . it must address the fact that many of the 15,000 babies who will be born in the Omaha area this year will be born out of wedlock to teen-age mothers." Harold W. Andersen, "Fundamental Lesson in Math Proficiency," Omaha World-Herald, Feb. 13, 1994, at 19-A.

(Footnote 5 continued)

system from the effects of de jure racial segregation, something much less than the present Kansas City program would clearly pass constitutional muster. *See Freeman*, 112 S. Ct. at 1448 ("[t]he vestiges of segregation . . . must be so real that they have a causal link to the de jure violation being remedied"); *Milliken II*, 433 U.S. at 282 (remedial programs tailored to cure the educational problems created by the constitutional violation); *see also Swann*, 402 U.S. at 24. Indeed, at the outset, the stated remedial goal was to provide schools of equal quality with those found in the average SSD in order to restore the victims of unconstitutional segregation "'to the position they would have occupied absent such conduct.'" *Jenkins II*, 855 F.2d at 1301 (quoting district court Order of June 16, 1986). Whether the goal was reached was to be measured by the AAA rating. The evidence clearly establishes that this goal has long since been greatly exceeded and can now be easily maintained without many of the present activities. The magnet schools, for instance, as the nomenclature implies, were primarily designed to draw students back to the KCMSD and, thus, to address the desegregation, as opposed to the compensatory and remedial, prong of the plan.

I recognize that I am citing material outside the record. But, whether or not Ms. Harvey is correct or was correctly quoted and whether or not her concerns have direct applications to minority and majority students in the KCMSD, she makes the valid point that school systems have no control over many conditions that directly affect the educational test results of students in public schools. Thus, such a "test results" standard goes well beyond practicality and the requirements of the Constitution.

Freeman, relied upon heavily by the panel, is not to the contrary. The quality of education issue in *Freeman* was introduced by agreement of the parties and the district court considered the point in connection with its findings on resource allocation. *Freeman*, 112 S. Ct. at 1446. The Supreme Court did not have the opportunity in *Freeman* to consider whether quality of education is one of the factors that must be free from racial discrimination before a school district can be declared partially unitary. *See id.* at 1443; *Green*, 391 U.S. at 435. The panel's declaration that "implementation of programs in and of itself is not sufficient" to prove unitary status without rising test scores finds no support in *Freeman*. *Jenkins*, 11 F.3d at 765.

In fact, the panel seeks to turn *Freeman* on its head. Although the *Freeman* district court concerned itself with scores made on the Iowa Test for Basic Skills (ITBS) and the Scholastic Aptitude Test (SAT), the minority students in *Freeman* did very well on the standardized tests. *Freeman*, 112 S. Ct. at 1441. The *Freeman* district court found, nonetheless, that specific "quality of education programs" concerning teacher qualifications, library books and other educational resources were not yet fully in place. It was lack of educational opportunity, not the results of test scores, that motivated the district court decision in *Freeman*.

In this case, KCMSD students have in place a system that offers more educational opportunity than anywhere in America. The district court stated in its April 16, 1993, order, however, that it was "not satisfied that the District has reached anywhere close

to its maximum potential because the District is still at or below national norms at many grade levels." Order of April 16, 1993, at 11. The question is "whether the vestiges of past discrimination ha[ve] been eliminated *to the extent practicable*." *Board of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (emphasis added). The words "to the extent practicable" have been lost in the shuffle. In our quest to eliminate the vestiges of de jure segregation, we should not forget that:

> [r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. . . . It is the duty of the State and its subdivisions to ensure that [the effects of de jure segregation] do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

Freeman, 112 S. Ct. at 1445. I suggest that court supervision of a desegregation remedy for 100 years, as suggested by Associate Superintendent Rainwater, is neither practicable nor desirable.

After the opinion in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (*Jenkins II*), the full court denied en banc consideration Judge Bowman, joined by Judge Wollman, dissented from the denial stating:

> This is a case of exceptional importance. The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order — the large number of magnet schools and the quantity of capital renovations and new construction — are concededly without parallel in any other school district in the country. Similarly, in no other case has federal judicial power been used to impose a tax increase in order to provide funding for a desegregation remedy.

> In addition, the case presents the over-arching question of whether these court-ordered programs and court-ordered taxes are Constitutionally required in order to rectify the vestigial effects of legally mandated segregation (dead now for over thirty years) or instead represent an unsupportable exercise of judicial power in a legislative-style attempt to solve social problems that have their origins in other causes.
>
> In over five years on the bench, I have not seen a case more deserving than this one of thoughtful consideration by the entire Court. The decision as it stands appears to arrogate to the federal judiciary vast powers that under the Tenth Amendment are reserved to the states or to the people. I therefore regret that a majority of the Court has voted to deny the petition for rehearing en banc.

Jenkins II, 855 F.2d at 1318-19. In retrospect, I regret that I did not join the dissent at that time. In my view, this case, as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication.

III.

Even with the observations I make today, I am not prepared, at least without further briefing and oral argument before the court en banc, to decide that the KCMSD is unitary in the area of equal opportunity to a quality education. I am prepared to say, however, that when faced with the state's request the district court, and the panel, embraced a measure, standardized test results, not required or permitted by the Constitution.

If the state's claim carries with it the unstated idea that having put the elements of a quality educational program in place it may now take its money and exit, stage left, leaving the KCMSD to finish the scene alone, I believe that partial unitary status is not at hand. But, if an equal opportunity to receive a quality education is now permanently available to each student in the KCMSD,

and is thus available to erase, if the opportunity is reasonably pursued, the vestiges of past discrimination, then unitary status has been reached and control should be relinquished by the federal courts to the state and local governments.

At a minimum, this court should consider, en banc, what issues are open and unanswered, except through faulty analysis, and remand the matter to the district court for further proceedings. *See Freeman*, 112 S. Ct. at 1450. If the evidence shows that the state and the KCMSD have an affirmative commitment to continue to provide a nondiscriminatory, quality educational program in Kansas City, unitary status should be declared, regardless of what the test scores show.

Thus, I dissent from the order denying the suggestion for rehearing en banc.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 17, 1992]

Before the Court is the KCMSD's Year VIII Desegregation Plan. The parties have stipulated to budgets for certain components and the Court heard evidence regarding the remaining disputed components on May 27-28, 1992. The Year VIII Desegregation Budget will be approved as set forth below.

The parties have stipulated to the following components and budgets:

	Stipulated Year VIII Budget	KCMSD Obligation
AAA	6,138,490	2,703,822
Reduced Class Size	16,988,240	16,988,240
Full Day Kindergarten	1,880,137	470,034
Summer School	2,334,374	583,595
Early Childhood Education	4,451,351	1,112,038
Interest Expense	593,500	593,500
Maintenance	4,233,527	4,233,527
	36,619,619	26,684,756

The parties dispute budgets for the following components:

Extended Day, Effective Schools, 1986-87 Magnets, District Communications, Security, Special Education Compliance and High School Prep. In addition plaintiffs have requested an Eight Period Day at Westport High School, Playground Equipment for Faxon Montessori and Team Travel/Tournament Entrance Fees for Central High School.

Extended Day—The KCMSD proposes a budget of $453,000 to continue the extended day programs at Border Star, James, Greenwood, Rock Creek West, Scarritt and Askew. The State objects that this program is not attracting non-minority students to the District's traditional schools. However, the KCMSD states that the program is an important factor in the decision of parents who chose these schools, particularly non-minority parents. The KCMSD also states that the program is having a significant impact on academic achievement.

Effective Schools—The KCMSD proposes a budget of $7,250,000 to continue the effective schools program. The KCMSD has restructured the program to focus on instruction and school climate, as well as competitive grants based on school success. The State objects that the effective schools program has not been successful in improving student achievement through planning and implementation at the school level.

The KCMSD admits that the program has resulted in mixed success. The KCMSD maintains that raw test score results when compared only with test score objectives do not adequately reflect improvements in achievement. Also, several school principals testified that their programs would suffer drastically without effective schools funding. The Court will continue funding for Year VIII.

1986-87 Magnets—The KCMSD proposes a budget of $8,001,410 to fund the 1986-87 Magnets. During 1991 the

District initiated discussions with the State and the DMC Budget Subcommittee on the desirability of providing Year VIII budgets in a manner that would more clearly depict the desegregation contributions of major activities funded by the Court. The Year VIII Magnet base budget reflects transfers of appropriate positions to other budgets. Also the 1992-93 proposal delineates base and theme costs. This Court agrees with the KCMSD that these programs should remain viable with desegregation funding for Year VIII.

District Communications—The KCMSD proposes a budget of $31,125 to publish a District newspaper ten times during the 1992-93 school year. The State objects that this component should be taken over by the District and placed in its operating budget. However, the newsletter is directly related to attracting non-minority suburban students into the KCMSD.

Security—The KCMSD proposes a budget of $1,897,037 for security. The KCMSD requests the addition of two clericals, two dispatchers, two patrol officers and an assistant to the Safety Manager. The KCMSD also requests overtime funding for approved desegregation budgets and the addition of five security vehicles. While this Court continues to believe that the primary responsibility for KCMSD security rests with the Kansas City Missouri Police Department, evidence at the hearing suggests that the KCPD is understaffed. Robert Livingston testified that personnel at the KCPD has not increased even though there has been a 300% increase in calls. Mr. Livingston concluded that the KCPD could not provide any additional help at this time.

There was substantial evidence regarding the number of calls and incidents at District schools, as well as the need for documentation and reports. The KCMSD clearly demonstrated the need for the additional security positions. The Court disagrees with the State's position that adding security makes schools less desegregatively attractive. Instead, increased security should

add to the attractiveness of a school which may be perceived as unsafe.

The Court notes that the budget for the addition of security vehicles should be calculated as $65,000 with the trade-in value of the replaced vehicles to be included in the $65,000 budget cap.

Special Education Compliance—The KCMSD proposes a budget of $990,044 for Special Education Compliance. The KCMSD suggests that the desegregation program has brought unique burdens to the KCMSD's efforts to maintain compliance with State and Federal guidelines for providing equal educational opportunities. The State argues that this request goes beyond the parameters of a desegregation remedy. This is an issue of State and Federal compliance with which each school district in the State must comply. The Court will deny desegregation funds for Special Education Compliance because the KCMSD has not shown that the desegregation program actually has presented a greater burden to maintain special education compliance.

High School Prep—The KCMSD proposes a budget of $323,145 for continuation of the High School Prep program which the KCMSD initiated in 1991-92 and has funded out of its operating budget. The KCMSD maintains that the High School Prep program is a desegregation component because the District needs to improve the achievement levels within the system in order to attract non-minorities outside of the system.

The High School Prep program focuses on significantly overaged middle school students who have been retained in a grade for two or more years. The voluntary program is designed to reduce the drop-out rate among high-risk students. The KCMSD states that the program makes a critical contribution to the overall success of the desegregation remedy by providing an opportunity to accelerate the educational progress of over-age students who are immediately at risk of leaving the educational

system. The program allows the student to re-enter the system at an age-appropriate level, substantially increasing the likelihood that the student will continue his education and graduate. The KCMSD notes that the program has been immensely popular.

While the Court agrees that this program is vital to the KCMSD and should be continued, the Court cannot justify the use of desegregation funds to help remedy a nationwide problem which the KCMSD has not specifically shown to be a vestige of segregation.

Eight Period Day at Westport High School—Plaintiffs request a budget of $262,500 for the addition of an eight period day at Westport High School. Plaintiffs state that without an extra period students at Westport will not be able to take all of the required core curriculum courses and also be able to take two or three courses which would provide a more intense exposure to theme studies.

Playground Equipment at Faxon Montessori—Plaintiffs request a budget of $22,500 for playground equipment at the Faxon Elementary Montessori Magnet School. The original planning budget did not provide for the purchase of any playground equipment. Plaintiffs submit that this is a problem at a Montessori school with its popular early childhood program for three and four year old children.

Team Travel/Tournament Entrance Fees for Central High School—Plaintiffs request a budget of $45,000 for travel and tournament costs. The evidence at the hearing demonstrated that athletes in programs such as fencing and weightlifting have been so successful that the teams must travel substantial distances in order to find comparably skilled teams for meaningful competition. Steve Butler, one of the fencing coaches at Central High School, stated that the fencing team at Central High School is beginning to receive national as well as international attention. There is no doubt but that the success and notoriety of the athletic

programs at Central High School will contribute to the desegregative attractiveness of the Classical Greek theme

This Court will approve the following Year VIII budgets in addition to those components already stipulated to by the parties.

	Proposed Year VIII Budget	KCMSD Obligation
Extended Day	453,000	113,250
Effective Schools	7,250,000	1,812,500
1986-87 Magnets	8,001,410	3,745,050
District Comm.	31,125	7,781
Security	1,897,037	739,844
Playground Eqpt.	22,500	5,625
CHS Team/Travel	45,000	11,250
Westport Ext. Day	262,500	65,625
	17,962,572	6,500,925

Also before the Court is the State's motion to require the KCMSD to submit its proposal for a long-term extension of the LRMP in lieu of a proposal for a one-year extension. The KCMSD filed a motion for approval of the LRMP extension. Both parties filed responses and presented oral arguments on the issue on May 29, 1992. This Court will require the KCMSD's LRMP proposal to be filed on or before September 1, 1992. It is important for students, patrons, parties and the Court to know which programs are effective and which programs should be changed or terminated.

Accordingly, it is hereby

ORDERED that the Year VIII Desegregation Budget is as follows:

	Desegregation Budget	KCMSD Obligation
AAA	6,138,490	2,703,822
Reduced Class Size	16,988,240	16,988,240
Full Day Kindergarten	1,880,137	470,034
Summer School	2,334,374	583,595
Early Childhood Education	4,451,351	1,112,038
Interest Expense	593,500	593,500
Maintenance	4,233,527	4,233,527
	36,619,619	26,684,756
Extended Day	453,000	113,250
Effective Schools	7,250,000	1,812,500
1986-87 Magnets	8,001,410	3,745,050
District Comm.	31,125	7,781
Security	1,897,037	739,844
Playground Eqpt.	22,500	5,625
CHS Team/Travel	45,000	11,250
Westport Ext. Day	262,500	65,625
	17,962,572	6,500,925
Total Desegregation Budget	54,592,191	33,185,681

and it is further

ORDERED that the KCMSD submit its Long Range Magnet Plan on or before September 1, 1992.

/s/ Russell G. Clark
RUSSELL G. CLARK
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: June _____, 1992

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 25, 1992]

Before the Court is the AFT's proposal for desegregation funding for teacher salary increases for fiscal years 1992-93 through 1994-95. The KCMSD filed a separate salary proposal for 1992-93. The State filed a response to both proposals. The parties filed subsequent replies and responses to the proposals. The Court set this matter for a hearing on June 9-12, 1992 and will approve a teacher salary package as set forth below.

At the end of the current fiscal year, desegregation funding for both the 1987 teacher salary package and the 1990 salary increase settlement will expire. If desegregation funding for salaries is not extended, teacher salaries will roll back to 1986-87 levels. The AFT has proposed a salary increase to keep the KCMSD competitive with the national urban market. The KCMSD has proposed to maintain salaries at their current levels with moderate equity adjustments. The State has proposed that this Court roll back teacher salaries to their 1986-87 levels because the salary increases have not met the goals set by the Court.

AFT SALARY PROPOSAL

The AFT's salary proposal requests that continued and increased desegregation funding of teacher salaries is necessary in order to assure equitable and effective implementation of the desegregation plan. The AFT proposes to raise salaries to levels that are competitive with the national urban market. Specifically, the AFT requests that the Court establish teacher salary schedules for the next three years at a level at least equal to the projected national urban average teacher salaries. The AFT also suggests that the KCMSD redirect under-expended resources out of other desegregation programs and into the budget for teacher salaries.

The AFT and the KCMSD assert that the most relevant market for setting teacher salaries in the KCMSD is the national urban school market. The AFT and KCMSD suggest that urban districts throughout the country provide a more meaningful comparison with the KCMSD in terms of size of budget, enrollment, employees, inner-city working conditions, minority/non-minority enrollment patterns, socio-economic levels and special needs of urban versus suburban student bodies. The surrounding local suburban school districts do not provide this same type of useful comparison.

The AFT asserts that setting salaries that are competitive with the national urban market is necessary so that the District can retain and attract high quality teachers. The AFT stresses that high quality teachers are essential to successful implementation of the desegregation plan. The AFT proposes that current KCMSD teacher salaries be restructured and increased so that the District will be comparable to or higher than average salaries paid in urban school districts throughout the United States.

The State disagrees that the national urban market is the most relevant market for purposes of comparison. The State of Missouri argues that the relevant labor market for teachers in the

KCMSD is the "regional market." The "regional market" is defined as Missouri and the eight states contiguous to Missouri: Kansas, Nebraska, Iowa, Illinois, Kentucky, Tennessee, Arkansas, and Oklahoma. The State's view is based on the origin of actual hires.

Recruitment efforts by the KCMSD indicate that the District recruits on a national level and the pool of certified applicants indicate that the District competes at a national level. After the 1990 salary order, 20.9 percent of the applicants were from Missouri, 23.2 percent of the applicants were from the eight contiguous states, 35.3 percent of the applicants were from other States and 20.7 percent of the applicants were from unknown origin. *See* AFT Ex. 28. This Court does not accept the State's contention that in order to find that the District competes in the national urban market, the District must show that it actually hires a substantial number of teachers or personnel from the national urban market. Also, Kansas City, Missouri is a part of the national urban market and other national urban cities are competing for Kansas City's teachers and staff. Therefore the Court agrees with the AFT and KCMSD that the national urban market is the most relevant market for purposes of comparing salaries in the KCMSD.

The AFT recommends that the best measure of the national urban market for teachers is the Department of Defense ("DOD") salary schedule which is based upon the average salaries of all urban school systems in cities of 100,000 or more population in the United States. Each year the DOD compiles a database of teacher salaries paid in approximately 170 urban school districts in the United States.

The AFT presented evidence that teacher salaries in the District lag significantly below the national urban average. According to the most recent statistics, teacher salaries in the national urban market have increased approximately 6.71% each

year in the last eighteen years. In terms of the dollar differences, the gap between KCMSD teacher salaries and the national urban average today is close to the gap that existed in 1986-87, before any desegregation funding for salaries was provided by the Court. *See* AFT Proposal at 21.

Thus, in the current 1991-92 school year, the gap between KCMSD teacher salaries and the actual and projected urban average salaries is considerable and will worsen unless significant salary increases are authorized and funded. For example, KCMSD salaries for beginning teachers in the B.A. and M.A. salary lanes are currently below the national urban average by approximately 4%. *See* AFT Ex. 14. At the top end of the B.A. and M.A. lanes the KCMSD's most experienced teachers are currently earning, respectively, about 19% and 14% less than the national urban average. *See* AFT Ex. 14. The AFT cautions that if teachers are paid at the same level in 1992-93, the KCMSD's ability to compete in the marketplace for teaching talent will be diminished even more severely.

Moreover, if the current salary increase orders are allowed to expire on June 30, 1992, teacher salaries for the 1992-93 school year will fall from a starting salary of $22,215 to just over $17,000. The net result of a roll back would be that the KCMSD would be forced to compete in the national urban market for beginning teachers at a 40-45% disadvantage. *See* AFT Ex. 31. The AFT warns that if current salaries are allowed to expire, salaries will revert to a level which will result in intolerable consequences for the desegregation plan. Such a roll back would place the KCMSD teacher salary schedule thousands of dollars behind any comparable school district and would devastate the District's ability to attract and retain teachers. The AFT fears that a roll back would essentially paralyze the District's ability to recruit and retain quality teachers who are vital to the desegregation program.

Art Rainwater, Associate Superintendent for Instruction, testified that a roll back would cause a number of teachers to defect to other markets and would definitely hurt the desegregation program. A salary decrease of this proportion could cause a mass exodus of District employees. Those teachers who could not leave the system would likely suffer from internal morale problems which might be passed on to the schoolchildren. A salary roll back would inevitably affect the attitudes of teachers who stayed in the District.

The AFT's proposal would remedy other inequities in the current KCMSD salary schedule. In the current KCMSD teacher salary schedule there are a number of non-uniform salary steps. For example, when a teacher in the B.A. salary lane moves from step to step, he or she normally receives a raise of $778.00. However, when moving from step four to step five in the B.A. lane, the teacher receives a raise of $888.00. When moving from step five to step six the teacher gets a raise of $667.00. There has been no explanation for these arbitrary differences between steps.

The AFT also urges that adoption of the DOD national urban market teacher salary schedule would permit the KCMSD to reform its current salary schedule by adding step increases for years of experience or "longevity" steps. Longevity steps are found in most urban salary schedules. The AFT proposes that the Court remedy disparities at the top end of the salary schedule by adding longevity steps. Longevity steps would account for additional salary shortfalls as compared to the national urban average.

Another problem with the absence of step increases in the KCMSD salary schedule is that there are salary inequities among similarly-situated teachers. Teachers within the District have been frozen at their current levels for two years. For example, a teacher who began her teaching career in the KCMSD and has

taught for ten years would be paid at step nine instead of step eleven. However, a teacher who taught for ten years in another school before being hired to teach in the KCMSD this year would be paid at step eleven. A two-step differential could result in a pay scale difference of $1,444 to $2,443 per year. Testimony at the hearing indicated that these types of inequities cause morale problems within the District and lead to internal dissatisfaction with the system. In turn, this leads to ineffective implementation of the desegregation program.

In summary, the AFT requests that this Court adopt the national urban average as the relevant market in which the KCMSD competes for teachers, administrators and staff. The AFT proposes to raise salaries, eliminate step inequalities and add step increases for teachers. The AFT also proposes to raise salaries of all categories of classified personnel: paraprofessionals, administrators, professionals, technical, clerical, security, nurses, food service, operating, building managers, cafeteria managers, information systems, miscellaneous schedule five employees, part-time workers, operating, maintenance, and parent educators.

The AFT urges this Court to order funding that will allow teachers to earn their regular hourly rate of pay for participating in workshops and inservice training outside of their regular work schedule. The AFT disagrees with the KCMSD that if current salary levels are maintained for 1992-93, the salaries will be roughly competitive with the national urban market. Finally, the AFT foresees particularly drastic consequences if salaries are rolled back to their 1986-87 levels.

KCMSD SALARY PROPOSAL

Due to the dire fiscal constraints currently facing the District, the KCMSD submitted a one-year proposal instead of supporting the AFT's three-year proposal. The KCMSD believes that the salary increases proposed by the AFT are larger than the

District can responsibly propose at this time. The KCMSD teacher salary proposal requests that this Court maintain current salaries and provide for minor equity adjustments for those positions which are paid substantially below relevant market rates.

The KCMSD proposes to maintain inservice programs for teachers in the 1990 salary package and continue inservice training for paraprofessionals. The District strongly believes that inservice training provides a valuable opportunity to develop theme-related expertise and to share teaching innovations which enhance the quality of curriculum offerings. The KCMSD's salary proposal would extend the work year for elementary principals by fifteen days to provide additional time for leadership and magnet theme training. In the past, many elementary principals have spent several uncompensated days addressing the needs of their schools. In addition, the KCMSD salary plan proposes to continue paying substitutes $75.00 per day, continue compensation for supervision of extra-curricular activities and maintain a reserve fund in the amount of $500,000.

The District's proposal offers a fiscally conservative, yet roughly competitive compensation plan for 1992-93. The KCMSD is confident that its proposal would enable District personnel to continue to attract and retain highly qualified personnel necessary to implement the desegregation plan.

STATE SALARY PROPOSAL

The State of Missouri responded to the salary proposals with a request that this Court discontinue desegregation funding for teacher salaries. The State asserts that its analysis of the effect of the 1990 salary increase demonstrates that the salary increase did not achieve its objectives. For instance, the State submits that the increase had virtually no effect on increasing the quality of new hires or decreasing the quality of staff who left the District. The State claims that the AFT and the KCMSD have virtually ignored the evaluative criteria approved by the Court.

The State concludes that the salary increases have had no demonstrable effect on improving the KCMSD's ability to implement the desegregation remedy and therefore the Court should allow salaries to roll back to the 1986-87 levels. The State suggests that continuation of salary increases would constitute an unauthorized upgrade of District operations under the guise of desegregation. The State submits that to the extent KCMSD resident taxpayers wish to support the school system, they should be given an opportunity to show that support by approving an operating levy increase sufficient to support the existing salary levels.

The State adds that quite apart from its position that increasing salaries is not desegregation related, the AFT has presented no evidence that the KCMSD is having any great difficulty recruiting nurses. The State maintains that health care for students is not related to the desegregation effort and that the school nurse issue is beyond the parameters of the resolution the DMC passed regarding the salary issue.

For that matter, the State maintains that all other categories of classified personnel for whom the AFT seeks salary increases are also non-instructional personnel, with the possible exception of paraprofessionals. The State argues that there is no data that the KCMSD is having difficulty attracting and retaining these personnel.

RESULTS OF THE SALARY INCREASES

Pursuant to this Court's previous orders, the KCMSD agreed to collect and report appropriate data regarding the results of the District's recruiting efforts and to implement reorganization of personnel recruiting efforts by adopting a personnel recruitment plan and schedule. The Court also approved the use of eighteen evaluative criteria as a means to assess the effects of the salary increases approved in the July 23, 1990 Order. The Court noted that the evaluative criteria, which were designed to identify

trends, should not be construed as setting "absolute numerical requirements or bright lines." *Id.* at 6.

The AFT, KCMSD and the State have interpreted the results of the data differently. The AFT and KCMSD contend that the data generally indicate that the salary increases assisted the KCMSD in becoming more attractive to higher quality personnel needed to implement the desegregation orders. The KCMSD emphasized that the results should be viewed in the context that the 1990 salary package did not provide a competitive salary advantage to the District but instead helped to alleviate a substantial and growing competitive disadvantage.

One issue of major contention was whether or not the salary increase had an effect on the District's ability to recruit and retain teachers. The District maintains that while salary may not be the sole factor in the KCMSD's recruiting and retention experience, no data are required to support the sound and logical conclusion that if salaries had lagged more than twenty percent below their current levels, it would have been considerably more difficult to attract and retain even nominally qualified and experienced personnel.

The KCMSD asserts that since the salary increase, more new hires have cited salary as their reason for selecting the KCMSD. *See* KCMSD Exs. 12, 14 and 15. However, the State's expert, Dr. Gold, asserts that the primary selection criteria for choosing to work at the KCMSD was "non-salary based." The District submits that this claim is not supported by the survey data which show that salary was identified as the number one reason newly hired certified personnel selected the KCMSD. *See* KCMSD Ex. 11. More newly hired classified, administrative and professional staff also identified salary as their reason for selecting KCMSD after the salary increase. *See* KCMSD Exs. 12 and 13.

The KCMSD argues that Dr. Gold's conclusion is a result of the manner in which he combined certain reasons for selecting

the KCMSD. The survey provides eight reasons for selecting the KCMSD: salary, family relocation, location, magnet plan, specific magnet program, benefits, KCMSD reputation and other. Dr. Gold combined "family relocation" with "location" and he combined "magnet plan" with "specific magnet program." He also separated "salary" and "benefits." Dr. Gold's results indicated that location and program-related interests are the primary selection criteria.

Regardless of whether salary is the primary reason for selecting the KCMSD, the results show that salary is a significant factor in the selection process. In light of the growing disparity between KCMSD salaries and salaries in the national urban market, it is no surprise that location and program-related interests are also significant factors which attract teachers to the KCMSD.

At the hearing, the State also presented evidence regarding the results of other data as applied to the eighteen evaluative criteria. The State's experts generally concluded that the salary increase did not produce statistically significant effects or trends. One aspect of the State's analysis used a "quality index" which combined years of experience, degree and most recent degree grade point average as a basis to determine the quality components included in some of the eighteen evaluative criteria.

The "quality index" was criticized for its limited value in measuring objective quality criteria. The AFT and the KCMSD emphasized that the index could not measure quality factors such as personality, charisma, motivation or enthusiasm. Nor did the quality index account for a teacher's entire undergraduate grade point average, the prestige of a particular university, other interests, honors or publications. Therefore, while the parties agreed that the quality index is comprised of important factors in determining the quality of a teacher, it is by no means representative of the whole spectrum of desirable teacher "qualities" that are considered in the hiring process.

The "quality index" does not necessarily demonstrate that the District was unsuccessful in hiring and retaining quality staff. Instead it may show that it is impossible to evaluate the true quality of teachers with three objective criteria. The quality index formula measures quantifiable factors of acknowledged relevance. Yet, these factors alone are an imperfect yardstick by which to measure the quality of thousands of individual teachers at the KCMSD.

The State concludes that the salary increase has not met the goals set by the Court and the salary increase should not be continued or expanded. The State insists that the lack of statistically significant trends in improvement signals the death knell for continued Court-ordered funding.

FUNDING PROPOSALS

Logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan. The AFT and KCMSD agree that the salary proposal adopted by the Court should be approved as a desegregation expense. The AFT requests that this Court impose joint and several liability with the State to pay 75% of the cost and the KCMSD to pay 25% of the cost. The AFT requests a three-year extension of the existing 96-cent property tax. The KCMSD urges the Court to approve its proposal as a desegregation expense with the State contributing 75% and the District contributing 25% . The KCMSD proposes to fund its share with a continuation of the 96-cent tax levy. The KCMSD's proposal would cost approximately $49.7 million and the AFT's proposal would add another $17.5 million for a total proposal of approximately $67.2 million.

The State claims that the Court should not approve desegregation funding for salaries because such funding would be beyond the scope of the Court's remedial authority. However, the Supreme Court has recently stated that "[t]he essence of a court's

equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Freeman* v. *Pitts*, 112 S.Ct. 1430 (1992). It is well-settled that a district court may require the expenditure of funds to implement a desegregation remedy. *See Milliken* v. *Bradley*, 433 U.S. 267 (1977).

This Court and the Eighth Circuit have "made abundantly clear 'that the constitutional violations must be remedied and these remedies fully funded.'" *Jenkins* v. *Missouri*, 931 F.2d 470, 476 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 437 (1991). "[A] court is entitled to require money for programs that materially aid the success of the overall desegregation effort." *See Arthur* v. *Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983).

In 1989, this Court concluded that the KCMSD's difficulty in hiring and retaining qualified personnel adversely affected the desegregation plan. This Court previously expressed concern about the District's ability to implement the desegregation plan in light of its salary structure. July 5, 1989 Order at 23. In approving the 1990 salary package, this Court found that the salary increases for KCMSD personnel were "essential to comply with the Court's desegregation orders." July 23, 1990 Order at 6.

High quality personnel are necessary not only to implement specialized desegregation programs intended to "improve educational opportunities and reduce racial isolation" *Jenkins* v. *Missouri*, 855 F.2d 1295, 1301 (8th Cir. 1988), *aff'd in part, rev'd in part on other grounds*, 495 U.S. 33 (1990), but also to "ensure that there is no diminution in the quality of its regular academic program." *Jenkins* v. *Missouri*, 672 F. Supp. 400, 410 (Mo. 1987), *aff'd*, 855 F.2d 1295 (8th Cir. 1988).

The KCMSD asserts that funding of the 1992-93 salary package as a desegregation expense is premised on the Court's findings that the District has difficulties "hiring and retaining

qualified personnel" which, in turn, negatively affect implementation of the desegregation remedy. There is no question but that a salary roll back would have effects that would drastically impair implementation of the desegregation remedy.

1992-93 TEACHER SALARY PACKAGE

The Court will adopt the KCMSD's salary proposal to maintain salaries for the 1992-93 school year, provide moderate equity adjustments, add fifteen days to the school year for elementary principals, maintain inservice training, maintain substitute pay, maintain extracurricular pay rates and maintain a reserve fund. The Court will approve a joint and several funding allocation of 50%/50% between the State and the KCMSD.

The KCMSD salary proposal is as follows:

	PROPOSED	CURRENT AMOUNT ALLOCATED	ADDITIONAL FUNDS NEEDED
Maintain Current Teacher Salary Level for Teachers Currently Budgeted	35,016,077	33,417,873	1,598,204
Provide Current Teacher Salary Level For Teachers Projected For Year VIII	564,715	0	564,715
Maintain Current Salaries of Other Employees	10,654,870	9,166,659	1,488,211
Provide Equity Adjustments	1,102,388	0	1,102,388
Lengthen School Year for Elementary Principals	231,866	0	231,866
Maintain Inservice Days for New Teachers	261,746	213,638	48,108
Provide Five Days of Para-professional Inservice	220,688	220,688	0
Maintain Substitute Rate at $75 Per Day	621,130	450,000	171,130
Maintain Extra-Curricular Pay Rates	568,911	675,000	(106,089)
Reserve	500,000	656,142	(156,142)
TOTAL	49,742,391	44,800,000	4,942,391

The additional funds needed for current teacher salary levels are for the cost of two summer school sessions, current vacancies, lane changes and fringe benefit increases. The District also estimates that there will be approximately 53 new teacher positions. These figures could change based on actual enrollment. The budget for maintenance of current salaries for other employees is increased slightly to include vacancies, new positions, overtime costs and revised fringe benefits rates.

The internal equity study cost projections for 1992-93 are as follows:

Executive Secretaries	69,564
Secretary A's	479,176
Secretary B's	263,205
Clerks	216,179
Admin. Staff	44,498
Nurses	29.765
	1,102,388

The State declares that, with the proposition of a salary roll back, "[the State] is not so naive as to believe" that the Court will not consider "the discomfort of those whose salaries would be reduced." State Post-Hearing Brief at 34. However, the basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD. In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and staff.

The success of the prior salary orders has been described as "qualified." Yet, the Court agrees with the KCMSD and the AFT that the results must be viewed in the context of how KCMSD teacher salaries actually compared with the national urban aver-

age teacher salaries. The State argues that the AFT and the KCMSD have improperly focused on the effect of a roll back. However, this is a relevant consideration. The success of the desegregation program rests in great measure upon those charged with implementing the plan.

In light of the District's current financial crisis, this Court will maintain salaries at their current levels for the 1992-93 school year and continue the 96-cent levy increase for an additional year. At this time, the AFT's proposal is simply not economically feasible. However, this Court rejects the State's proposition that "to tie salaries for employees to an asserted national urban market would be a gross misuse of public funds." State Post-Hearing Brief at 5. Instead, the substantial increase sought by the AFT should be deferred.

The State's proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court's plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan.

Accordingly, it is hereby

ORDERED the KCMSD's salary proposal for 1992-93 is approved as follows:

	PROPOSED	CURRENT AMOUNT ALLOCATED	ADDITIONAL FUNDS NEEDED
Maintain Current Teacher Salary Level for Teachers Currently Budgeted	35,016,077	33,417,873	1,598,204
Provide Current Teacher Salary Level For Teachers Projected For Year VIII	564,715	0	564,715
Maintain Current Salaries of Other Employees	10,654,870	9,166,659	1,488,211
Provide Equity Adjustments	1,102,388	0	1,102,388
Lengthen School Year for Elementary Principals	231,866	0	231,866
Maintain Inservice Days for New Teachers	261,746	213,638	48,108
Provide Five Days of Para-professional Inservice	220,688	220,688	0
Maintain Substitute Rate at $75 Per Day	621,130	450,000	171,130
Maintain Extra-Curricular Pay Rates	568,911	675,000	(106,089)
Reserve	500,000	656,142	(156,142)
TOTAL	49,742,391	44,800,000	4,942,391

and it is further

ORDERED that the KCMSD is authorized to maintain its property tax levy at a rate of $4.96 per $100 assessed valuation for the 1992-93 tax year; and it is further

ORDERED that funding for the 1992-93 salary package will be 50%/50% joint and several liability between the State and the KCMSD.

/s/ Russell G. Clark
RUSSELL G. CLARK
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: June ____, 1992

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 30, 1993]

This matter comes before the Court on the American Federation of Teachers, Local 691's ("AFT") motion for desegregation funding for certified and classified employee salary increases in Fiscal Years 1993-94 through 2002-3; AFT's motion for desegregation funding for operating, warehouse, maintenance, mailroom, and food service employee wage increases in fiscal years 1993-94 through 1995-96; the Kansas City Missouri School District's ("KCMSD") motion for desegregation funding of its salary proposal for 1993-94 through 1995-96; the State of Missouri's ("State") motion for an order expressly establishing the State's right of contribution; and the State's motion to strike the plaintiffs' pleading filed post-hearing or in the alternative for leave to file a response to said pleading. This matter has been the subject of extensive briefing by the parties. The State has responded by way of its consolidated response in opposition to AFT's and KCMSD's salary motions. The KCMSD and AFT have each replied to the State's memorandum in opposition to the motions. A hearing was held on June 1-3, 1993 and the Court received evidence on the issues presented in the above referenced pleadings. The plaintiffs filed a post-trial memorandum in support of desegregation funded salary increases for KCMSD employees. The State has filed a motion to strike plaintiffs' pleadings or in the alternative for leave to file a response. The Court, after reviewing the evidence presented at trial and after a thorough examination of the pleadings submitted by the parties, will grant the AFT's motion in part and deny it in part; grant the KCMSD's motion in part and deny it in part; deny the State's motion to strike; grant the State's motion for leave to file a response to plaintiffs' post-hearing memorandum; and defer ruling on the State's motion for an order establishing a right of contribution as set out herein.

The Court has previously addressed the issue of "law of the case" to the extent that it applies to the evidence presented herein. The Court announced to the parties at the trial of these issues that the "law of the case" doctrine applies only where the district court has decided an issue and that issue has been presented to and resolved by an appellate court. The same issues as those presented this year in the salary hearing were presented last year and are currently on appeal to the Eighth Circuit Court of Appeals. That being the case, the "law of the case" doctrine will not operate to bar the Court from considering the evidence and deciding the issues again this year. However, the Court is not inclined to make a different ruling where the evidence presented is substantially unchanged. The Court has reviewed the evidence in its entirety and finds that the evidence presented this year is strikingly similar to the evidence presented last year. Therefore, the Court will not change its rulings with respect to the issues contested by the State in this year's hearing. There is no basis to find that the KCMSD is no longer in the national urban market nor that salaries of KCMSD personnel are not appropriately considered to be a desegregation expense. The Court does have inherent authority to modify its remedy in this matter. It is the intention of the Court to modify the salary component of the desegregation remedy as set out below.

Due to the insignificant, if any, change in the evidence from last year to this year the Court will not elaborate on the evidence adduced at the trial on this issue. Rather, it is the Court's intention to fashion a salary order which is appropriate under the continued climate in the district. The one glaring problem made obvious by the testimony at this year's hearing is the absence of the step increases over the last three years. The inequality created by the missed step increases is a fundamental flaw in the compensation package in the KCMSD. It is the purpose of this Order to rectify the inequality and allow those missing steps to be recompensed. The proposal of the AFT was to reinstate the lost steps over a period of three years. While this proposal would reduce the initial outlay of funds, it would not immediately correct the inequality in the salary package. The Court also notes that the immediate adjustment for lost steps would lessen the long-run costs in the salary component, albeit by a relatively small amount. Therefore, the Court will order that the KCMSD make reparation to those individual employees currently employed by the district who have not been afforded step increases due to the structure of the salary package.

The next issue raised in this litigation was whether the KCMSD participated in the national urban market. The Court has previously held that the KCMSD did, in fact, compete in the national urban market for teachers. The State, again this year, sought to present evidence to the contrary. However, if anything, the State's expert witnesses supported the proposition that the District did compete in a national urban market. The Court finds no reason to alter its previous findings and would therefore reaffirm its finding that the KCMSD competes in the national urban market for teachers.

The Court has found that the underlying issues of whether the national urban market is correctly applied, whether the salary component is properly a desegregation expense, and whether salary increases have a positive impact on the desegregation

effort should be resolved again this year in the same manner as last. The Court, having found that the salary increases are a necessary component of the desegregation program, must now determine the extent to which a raise would be appropriate this year.

State's Plan

The State submitted to the Court a plan by which the KCMSD classroom teachers and other instructional personnel would receive a 1% increase of their base salary for FY1994 + $400. The Court, again, finds that the State has failed to bring to the Court a serious proposal for the issue currently pending. This proposal is reminiscent of "patch and paint" or "OBE in three schools in place of the magnet program". The State's proposal is simply not consistent with the meaningful implementation of the desegregation program. The State has argued repeatedly and currently on appeal that the salary component is not a valid component of the desegregation remedy. The State has every right to maintain its position. However, the State has the ability to offer a reasonable alternative while not jeopardizing its legal arguments currently on appeal. The proposals of the State have been of little or no benefit in the past and are of painfully little aid to the Court in this instance, as well. Therefore, it is left to the Court to craft a viable alternative given the constraints facing the district at this point in time.

The Court will note that the testimony at trial reflected that the Missouri Legislature has had five years to pass legislation which would enable the KCMSD to fund its share of the desegregation expenses. While the State has not passed such legislation, as of this date, the Legislature has inserted a line item in this fiscal year's budget to reflect the anticipated costs of a salary increase. The Court notes with approval the State's effort to maintain its fiscal responsibility in this area.

The Court has previously found that the AFT's proposal for 1992-93 was not economically feasible at the time but that the Court, if able, would provide for much of the salary increases proposed by the AFT. Additionally, the Court specifically rejected "the State's proposition that 'to tie salaries for employees to an asserted national market would be a gross misuse of public funds.'" (June 25, 1992 Order, at 16). Here again, the Court is compelled to consider the same alternatives. There is one major difference. The persons for whom raises are sought have foregone yet another year without salary adjustments.

AFT's Plan

The AFT has submitted a proposal for certified and classified personnel to receive additional compensation as per the following scenarios. First, it is suggested that the Court adopt the 1992-1993 DOD salary schedule in 1993-94. Additionally, the AFT suggested that the Court also include Longevity Steps and make up the lost steps which current teachers have previously foregone. The estimated costs of these respective alternatives were presented in AFT Exhibit 32 and are set out below:

ESTIMATED COST PROJECTIONS
AFT SALARY PACKAGE
1993-94 TO 1995-96

	Current Amount Allocated	1993-94 Proposed	1994-95 Proposed	1995-96 Proposed
Maintain proposed teacher salary for teachers currently budgeted	35,016,077	54,867,436	67,083,995	80,213,547
Maintain proposed salaries and work year of other employees	8,055,509	11,759,051	14,247,767	16,894,576
Provide proposed salary increases for additional employees	564,715	1,328,859	2,289,441	3,217,861
Maintain inservice days for new teachers	261,746	277,451	294,098	311,744
Maintain substitute rate at $75 per day	621,130	621,130	621,130	621,130
Maintain extra-curricular pay rates	568,911	568,911	568,911	568,911
Regular hourly rate for magnet inservice	0	2,394,576	2,573,532	2,765,862
Reserve	500,000	500,000	500,000	500,000
TOTAL	45,588,168	72,317,414	88,178,874	105,093,431

ANALYSIS OF AFT SALARY PROPOSAL

Proposal	1993-94 Estimated Cost	1994-95 Estimated Cost	1995-96 Estimated Cost
1992-93 DOD Implement in 1993-94 Includes all Lost Steps and Longevity	72,317,414	88,178,874	105,093,431
1992-93 DOD Implement in 1993-94 Includes all Lost Steps - No Longevity	68,308,205	83,798,440	100,325,951
1992-93 DOD Implement in 1993-94 No Lost Steps - No Longevity	63,642,828	78,726,048	94,827,515
Annual Incremental Costs:			
Cost to Make Up Lost Steps and Grant Longevity (1992-93 DOD in 1993-94)	8,674,586	9,452,826	10,265,916
Cost of Longevity Steps (1992-93 DOD in 1993-94)	4,009,209	4,380,434	4,767,480
Cost to Make Up Lost Steps (1992-93 DOD in 1993-94)	4,665,377	5,072,392	5,498,436

The Court must consider the fiscal realities in which the District is forced to operate. Also, the Court must consider the need to have successful implementation of the desegregation program. It has repeatedly been decided by this Court that the salaries at issue herein are a proper expense under the desegregation program. Therefore, the question, as correctly stated by the District, the AFT and the plaintiffs at the beginning of the trial on this issue, is not whether to give a raise to those included in these programs, but rather how much of an increase is appropriate.

The Court views the fiscal horizon as changing for the district. The Legislature has adopted a new educational funding package which appears to result in a substantial gain for the KCMSD in terms of a net increase in state non-desegregation funding. The Court has further noted that there has been some activity in the Legislature towards allowing the KCMSD some viable alternatives in financing its share of the desegregation expense. Moreover, the Legislature, anticipating the salary increase contemplated herein, included an increase in this year's budget item for salaries over last year's. Moreover, the Court in April of this year adopted a two-year extension of the LRMP with certain minor modifications. The Court adopted what was most certainly a less expensive plan than that offered by the KCMSD. It is expected that this cost savings would be used to the benefit of the desegregation program in general and specifically there should be some added ability of the District to fund its share of the salary increases. The Court finds that the fiscal climate in the District is changing for the better and that there is a substantial need to address the inequalities in teachers' salaries created in the past.

The Court finds that the area of foremost importance is the return to the teachers of lost step increases. As noted above, the Court believes that the best approach in this instance is to return the lost steps in year one (FY93-94). This will result in an inordinate increase in year one but in the long-run will be the least-cost approach. Therefore, the Court will order that the missed salary steps for current KCMSD teachers be restored in FY93-94.

The Court further finds that the teachers in the KCMSD have gone without a salary increase for long enough. It is essential to the success of the desegregation program that those persons charged with implementing the plan be the most qualified persons reasonably attainable. The Court has found that the KCMSD most assuredly competes in the national urban market. Therefore, it is appropriate for the Court to look to this market for guidance as to what the relevant teachers' salary should be. The DOD schedule provides an accurate representation of what the national urban market will bear in terms of teachers' salaries. The Court finds that the DOD schedule is the appropriate benchmark for the KCMSD to use in determining teachers' salaries. While the Court does find that the AFT's package would be of the greatest advantage to those represented, it is still not viable for the Court to implement at this time. However, as repeatedly announced herein, the Court does find that some increase is appropriate.

KCMSD Plan

The KCMSD has proposed for 1993-94 to set teachers salaries by reference to a teacher salary schedule prepared by the DOD for 1991-92. This would result in an approximately four percent increase in entry-level pay for KCMSD teachers with a bachelor's or a master's degree. All eligible teachers would again receive regular annual step increases. The KCMSD recognizes that its proposal is not designed to allow the KCMSD to immediately be competitive in the national urban market. Rather, the plan offered by the District calls for the District to be "roughly competitive". The Court expects that the District will one day be more than "roughly competitive", however, at this date the District has offered the most fiscally sound alternative. Therefore, the Court will adopt the District's proposal with the addition of the step increases as discussed above. The package offered by the District and approved by the Court is as follows:

ESTIMATED COST PROJECTIONS*
KCMSD SALARY PACKAGE
1993-94 TO 1995-96
(without step increases restored)

	Current Amount Allocated	1993-94 Proposed	1994-95 Proposed	1995-96 Proposed
Maintain proposed teacher salary for teachers currently budgeted	35,016,077	41,621,333	48,218,767	55,108,579
Maintain proposed salaries and work year of other employees	12,209,812	15,743,754	19,154,177	22,782,827
Provide proposed salary increases for additional employees	564,715	1,027,317	1,671,709	2,260,665
Maintain inservice days for new teachers	261,746	269,598	277,686	286,017
Maintain substitute rate at $75 per day	621,130	621,130	621,130	621,130
Maintain extra-curricular pay rates	568,911	568,911	568,911	568,911
Reserve	500,000	500,000	500,000	500,000
TOTAL	49,742,391	60,352,043	71,012,380	82,128,129

* This cost projection includes restoration of step increases but does not compensate for missed step increases and does not include certain longevity steps in the DOD teacher Salary schedule.

The Court will further order that the District's proposal for a 2% per year increase for administrators and non-represented employees, as well as for classified employees (other than those listed below) be adopted for FY93-94 through FY95-96. Next the Court is asked to consider the "group exit" program. The program offered by the District is of the type which the Court would generally support. The Court will approve the KCMSD's proposal to develop a "group exit" program but will reserve approval of any specific program until the District brings forth the completed version of any such program.

AFT Proposal for SEIU Local 12 Bargaining Unit

The Court will next address the AFT's motion for desegregation funding for operating, warehouse, maintenance, mailroom, and food service employee wage increases in FY93-94 through FY95-96. The evidence presented at trial reaffirmed the position that the support personnel of the district are critical to the successful implementation of the desegregation program. The AFT has put forth a proposal as follows:

	1993-94	1994-95 and 1995-96
Operating Dept.	4% Wage Increase + Step Increase	4% Annual Increases + Step Increases
Maintenance Dept.	10% Wage Increase + Equity Adjustments for Truck Driver and Warehouseperson	4% Annual Increases
Warehouse Dept.	Wage Increases Based on Those Given Identical Job Titles in Maint. Dept.	4% Annual Increases
Mailroom Dept.	Wage Increases Based on Those Given Same/Similar Job Titles in Maint. Dept.	4% Annual Increases
Food Services	6% Wage Increase + Elementary School Manager Equity Adjustment + Step Increases	4% Annual Increases + Step Increases

The Court has carefully considered the AFT's proposal with respect to the employees listed above. The District has proposed a 4% annual salary increase for maintenance workers without annual step increases through FY95-96. While the Court has consistently found that the support personnel form an integral component of the desegregation program, the Court is not convinced that the increases sought by the AFT or the District are sufficiently well supported to allow for such a large increase at this time. The Court finds, however, that some increase is appropriate. The Court finds that the appropriate amount of increase in the wage rate for these departments is 2.5% for each of the periods listed above, for a total of 7.5%. The Court will not direct that the District implement the step increases as urged by the AFT. Rather, the Court finds that this matter is better left to the bargaining between the parties.

The Court finds that it is important for the KCMSD to be able to continue to contribute to the salary expense incurred due to the desegregation program. Therefore, the Court will order that the KCMSD is authorized to maintain its property tax levy at a rate of $4.96 per $100 assessed valuation for the 1993-94, 1994-95, and 1995-96 school years. The funding for the salary package announced herein will be 50%/50% with joint and several liability between the State and the KCMSD.

State's Additional Motions

The State has filed a motion to strike the plaintiffs' post-hearing brief or in the alternative has requested leave to file a reply to plaintiffs' memorandum. The Court does not condone haphazard disregard for the time limits which are imposed by the Court, usually after protracted negotiation between the parties. Additionally, the Court notes to plaintiffs that a discussion with the judge's law clerk is in no way seeking leave of the Court to file a pleading out of time. The Court agrees that in the further pursuit of an equitable resolution of the matters herein it is

appropriate to have the position of the plaintiff schoolchildren before the Court. The position taken is of surprise to no one. The Court finds that no party is prejudiced by the filing out of time of plaintiffs' memorandum. However, in the interest of fairness the Court will grant the State's motion for leave to file a reply. The Court has considered each of the pleadings in making the decision announced herein.

Next, the State has moved the Court for an Order establishing an express right of contribution in the State. The Court has reviewed the briefs of the parties on this issue and finds them to be exemplary. It has come to the Court's attention that there may be further evidence adduced at the forthcoming hearing on this issue. Thus, the Court finds that it is appropriate to defer ruling on the issue of the State's right to contribution. The Court specifically finds that the issue for contribution with respect to the matters decided herein will be deferred pending the trial on the *Milliken II* issues on July 7, 1993.

In summary, the Court has found that the salary package presented by the District is the most economically feasible at this time. There, is no basis for the Court to change its previous rulings on the issues presented herein. It is the Court's intention that the lost-steps be recompensed in FY93-94. The Court will defer ruling on the State's motion for contribution but expressly reserves any ruling on the issue of contribution for the salary package adopted herein.

Accordingly, it is hereby

ORDERED that the KCMSD's salary proposal for 1993-94, 1994-95, and 1995-96 is approved as follows:

	Current Amount Allocated	1993-94 Proposed	1994-95 Proposed	1995-96 Proposed
Maintain proposed teacher salary for teachers currently budgeted	35,016,077	41,621,333	48,218,767	55,108,579
Maintain proposed salaries and work year of other employees	12,209,812	15,743,754	19,154,177	22,782,827
Provide proposed salary increases for additional employees	564,715	1,027,317	1,671,709	2,260,665
Maintain inservice days for new teachers	261,746	269,598	277,686	286,017
Maintain substitute rate at $75 per day	621,130	621,130	621,130	621,130
Maintain extra-curricular pay rates	568,911	568,911	568,911	568,911
Reserve	500,000	500,000	500,000	500,000
TOTAL	49,742,391	60,352,043	71,012,380	82,128,129

and it is further

ORDERED that the foregone salary step increases are ordered restored for FY93-94; and it is further

ORDERED that the Court approves funding for 2% annual wage increases in FY93-94 through FY95-96 for administrators and other non-represented employees as well as for classified personnel (other than those discussed herein); and it is further

ORDERED that the Court approves a 2.5% annual wage increase for each of those persons represented by the AFT'S motion for operating, warehouse, maintenance, mailroom, and food service departments for FY93-94, FY94-95, and FY95-96 for a total of 7.5%; and it is further

ORDERED that the District's request to develop a "group exit" program is granted; and it is further

ORDERED that the State's motion to strike plaintiffs' post-trial memorandum is denied; and it is further

ORDERED that the State's motion for leave to file a reply to plaintiffs' memorandum is granted; and it is further

ORDERED that the Court will defer ruling the State's motion for an order establishing an express right of contribution until after the July 7, 1993 hearing on *Milliken II* issues.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: June 30, 1993

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: July 30, 1993]

The Court has pending before it several motions regarding the desegregation programs in the KCMSD. The first matter is the joint motion of the KCMSD and plaintiffs for approval of next two years of *Milliken II* desegregation plan. Also before the Court is the motion of the KCMSD for approval of final FY92 costs for temporary relocation of students and programs ("Staging"). Lastly, the KCMSD has filed a motion to alter or amend the Court's Order of June 30, 1993 ("Salary Order").

The AFT has responded to the KCMSD's motion to alter or amend the Salary Order. Additionally, the State has responded to the motion as well. The Court has previously indicated to the parties through informal communications that it intended to issue an order clarifying the Salary Order and will do so in response to the KCMSD's motion to alter or amend. The Court will grant the KCMSD's motion in part and deny it in part.

With respect to the motion for approval of final FY92 staging costs, the parties have informally made known to the Court that there was no opposition to the District's motion. A response has

not been filed by any party. The Court having duly considered the merits of the KCMSD's motion for final FY92 staging costs will grant the KCMSD's motion as proposed.

The State has responded to the joint motion with respect to the *Milliken II* component of the desegregation program. A joint stipulation was filed in this matter resolving many of the components of the *Milliken II* program. On July 7, 1993, the Court held a hearing on the remaining disputed items in the joint proposal. Upon consideration of the evidence presented at the hearing and the arguments made by the parties in pleadings previously submitted, the Court will grant the joint motion in part and deny it in part in accordance with the following discussion.

MILLIKEN II

The remaining *Milliken II* components for which the State has alleged factual disputes are (1) inclusion of additional special education teachers in the Base Budgets; (2) use of the 1986-87 level for determination of the appropriate level of maintenance spending; (3) enhancements to the security program currently in effect; (4) extension of the Effective Schools program; (5) inclusion of the Full-Day Kindergarten program without offset for monies received as a result of S.B. 380. The State further argues that the Court should reject the joint motion *in toto* because the KCMSD has attained the sufficient levels of desegregation called for under *Freeman v. Pitts*, 112 S.Ct. 1430 (1992). Based on this argument the State urges the Court to deny any additional funding of *any* of the *Milliken II* components requested in the joint motion. Lastly, the State again calls for an order of the Court expressly establishing a right of contribution in the State for monies expended under the previous orders of the Court allowing for joint and several liability for desegregation expenses in the KCMSD.

The Court will first address the State's argument that the desegregation programs called for under the *Milliken II* compo-

nent have reached the necessary level of compliance with the desegregation decree in this case. The State offers the findings of the United States Supreme Court in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992) in support of its arguments. In *Pitts* the Court held that where a district court's desegregation order has been substantively complied with in certain areas the court may withdraw desegregation supervision of those areas even though the program has not been fulfilled in its entirety. The Court has heard evidence presented by the State in several recent hearings offered to show that the desegregation program in the KCMSD has been a complete failure. In the LRMP renewal hearing held early in this year the State repeatedly argued that the District has failed to show sufficient signs of improvement as a result of the magnet program to justify continuation of that program. The State has repeatedly taken the position that the desegregation programs ordered by the Court have been of absolutely no benefit to the school children of the KCMSD.

It appears now that the State is arguing that all is cured. The State, as it has in the previous *Milliken II* hearings, has argued that the programs covered under this component have attained the necessary levels of desegregative effect and should therefore be turned over to the KCMSD for continued implementation. The Court has previously ruled as a result of the LRMP renewal process that the KCMSD has not met the goals and standards set by the Court in establishing the desegregation remedy. The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of

the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. Therefore, the Court will order the continued implementation and funding of the *Milliken II* components for which the joint stipulation was entered for two years.

The Court will next consider the individual programs with which factual issues have been raised regarding their further implementation as part of the *Milliken II* component of the desegregation remedy. The first issue is inclusion of additional special education teachers in the Base Budgets. The State opposes the additional special education teachers on the basis that this expense is incurred as a result of an accounting mistake on the part of the District and the State argues that it should not be made to bear this burden. The Court finds that the teachers at issue herein are necessary to meet the special needs of some students who choose to attend magnet programs. The fact that these positions have been the subject of a previous accounting error is irrelevant to the future consideration of desegregation expenses as a result of the need to provide these services. The Court finds that these positions are legitimate desegregation expenses and their inclusion in the Base Budgets is appropriate. Therefore, the Court will approve the requested addition to the Base Budget component.

Next, the Court will consider the use of the 1986-87 square footage level for determination of the appropriate level of maintenance spending. Mr. Robert Brogi, Deputy Superintendent, testified to the appropriate measurement of maintenance attributable to the desegregation program. In order to calculate this amount, Mr. Brogi compared the pre-remedy square footage to the post-remedy square footage and determined that the difference was the amount attributable to desegregation. He further testified that he believed that the maintenance in the KCMSD was getting better but there were some areas which

could use improvement. The Court has reviewed the maintenance component submitted as a part of the *Milliken II* program and finds that the Maintenance plan is an appropriate component to the overall desegregation remedy. It is imperative that the District be able to maintain the programs made available as a result of the desegregation remedy and the Court will do everything in its power to see that this goal is met. However, the concept of using the 1985-86 as the base year for attributing desegregation expenses presupposes that the KCMSD would never have incurred any growth in its physical plant over the time period contemplated. The Court does not have an exact method of determining the precise amount of square footage attributable to desegregation. However, it is the belief of the Court that the District should be responsible for some of the growth in the district and finds that the recommendation of the DMC to use August 1991 as the base year is the appropriate method for calculation. The Court will therefore order the extension of the maintenance component of the *Milliken II* component as proposed by the District with the modification that the base year for comparison be August 1991.

The Court will next consider the proposed enhancements to the security program offered by the District in the *Milliken II* proposal. Captain Livingston testified that the security of the KCMSD was a legitimate expense to be incurred by the desegregation program and that to fully implement the security plan it would need to be expanded as proposed. The Court concurs with Captain Livingston's assertion that the Security Component is a primary consideration in the implementation of the desegregation remedy. Moreover, the Court finds that the security of the school children and the staff of the schools is of utmost importance to the Court in fashioning the remedy in this case.

The Court does wish to express its concern over the submission of expenses for security as desegregation related expenses when there is no such relationship. These allegations were made

during the hearing, but not fully substantiated. The Court would suggest to the district that it use all due diligence in tracking such expenses and ensuring that there is no opportunity for misapplying already scarce resources. The Court will not look favorably on a return of such claims. The Court does not believe that it is imperative to have the additional officers as requested by the reorganization of the security department. While it is the Court's opinion that there is no question that the additional personnel would heighten security the Court does not believe that the changes, as proposed, are fiscally sound. Therefore, the Court will deny the request for additional staffing.

It is appropriate at this point for the Court to note that the City has a vested interest in the school system being rebuilt. The Court has gone to great lengths to provide the KCMSD with facilities and opportunities not available anywhere else in the country. The City must take some responsibility in maintaining these schools. The City receives the benefit of the attractiveness and acclaim of these schools. However, it appears to the Court that the City has shirked its responsibility in maintaining the school system being provided to it. It is entirely appropriate for the Police Department of Kansas City, Missouri to supply security to schools that are in need. The police in Kansas City have the responsibility of protecting its citizens and the many thousands of school children are just as deserving as any other citizen. The Court urges the District to approach the City and attempt to coordinate some provision of security by the police department whether it be in the form of sub-stations or some other alternative. It is incumbent on the City to be responsible for *all* of its citizens.

The Security proposal included the request for additional vehicles. Captain Livingston testified that should the request for additional personnel be denied that there would be no need for additional vehicles. The Court, having found that the additional personnel will not be provided, further finds that the request for

additional vehicles will also be denied. The KCMSD has proposed the addition of walk-thru metal detectors for purposes of security. The Court finds that the climate of activity in the KCMSD is such that this is a reasonable expense. The Court will therefore grant the request for walk-thru metal detectors. The Court will extend the Security component of the *Milliken II* program for a concurrent two-year time period with the other components but the Court will deny the requested additions to the Security component with the exception of the walk-thru metal detectors.

The Court will next consider the proposed extension of the Effective Schools program. The State has taken the position that the District failed to present any evidence for evaluation of the Effective Schools program and that the motion for extension of that component should therefore be denied. The District and plaintiffs argue that there exists no evidence of success or failure as the data has not been available for evaluation. The data will be available at the end of the 1993-94 school year to measure the impact of the Effective Schools program. The plaintiffs further argue that the Court, in its previous order, adopted the Effective Schools program for two years but funded it for only one. The plaintiffs argue that it was implicit in the Court's previous order that it would extend funding for the second year even though it would be impossible to evaluate the program as the data would not yet be available. The Court finds that the Effective Schools program should be extended for one additional year per its previous order. The District is directed to continue to collect data to evaluate the impact of the Effective Schools program. The Court, in considering the appropriateness of a further extension of the Effective Schools program at the end of FY93-94, will expect that the District be able to submit a detailed analysis of the impact of this program for the Court's review at that time. The Court will therefore grant the District's motion for extension of the Effective Schools component and appropriate funding for FY93-94.

The Court will next consider whether the inclusion of the Full-Day Kindergarten program without offset for monies received as a result of S.B. 380 is an appropriate component of the *Milliken II* program. The Court has previously found that the Full-Day Kindergarten was a benefit to the desegregation effort in the KCMSD and an essential part of the remedy. The Court finds that the evidence presented at the hearing on this issue did nothing to change the Court's perception of this program. It is fundamental that the school children of the KCMSD be given every advantage at the earliest possible age and this program addresses that need. The State argues that the District is receiving a windfall because Full-Day Kindergarten is a qualifying requirement for certain monies under the new school foundation formula known as S.B. 380. The Court finds that the fact that the district receives additional resources from the State's formula because a portion of the formula recognizes the benefits of the Full-Day Kindergarten program is of no consequence when determining whether to include that program as part of the remedy. The Court has found that the State is a constitutional violator and is required to fund the remedy as ordered by the Court. The fact that the District is going to receive additional revenues under the new foundational formula is irrelevant to the consideration of obligations due the plaintiff school children as a result of the constitutional violations of the State. The Court will not allow the offset of Full-Day Kindergarten monies by any additional amount received under S.B. 380. The Court will grant the joint motion with respect to the Full-Day Kindergarten component as proposed.

SALARY ORDER

With respect to the KCMSD's motion to alter or amend the Salary Order the Court has previously indicated its inclination to issue an order clarifying its original opinion. The Court has fully considered the arguments presented by the parties and finds that there exist two major issues to be addressed. First, is the issue of whether there is to be an actual cash outlay to current teachers in

compensation for lost steps. It was the original intention of the Court to put the teachers in FY93-94 on the step where they would have been had there been consistent step increases in the past. The Court by its June 30, 1993 Order did not intend to have the District make a cash outlay to the teachers for foregone step increases. However, the teachers currently in the district will receive the prospective benefit of lost step increases by being placed on the higher steps for which they are eligible.

The next issue addressed by the KCMSD's motion to alter or amend the Salary Order is in the area of step increases for administrators. In its Order of June 30, 1993 the Court intended to restore lost step increases *only to teachers*. The Court granted a two percent pay increase to the administrators and it was the intention of the Court that such pay increase be a flat rate increase. As a matter of illustration, an administrator who made $100 in FY92-93 would receive $102 in FY93-94 and a similar two percent increase in each of the other years covered by the Salary Order. The Court did not intend to adopt the salary proposal of the District which allowed for step increases for administrators. It was the sole intention of the Court that the administrators receive a two percent flat rate increase.

The Court, by this Order, does not intend to disparage the administrators and other non-represented personnel of the KCMSD and finds specifically that the proper administration of the district is imperative to the continued success of the desegregation program. However, as a matter of fiscal conservatism in the face of the budget constraints faced by the District the Court finds that it is appropriate only to allow for a small increase in compensation at this time. The Court believes that the District may have opportunity to provide further increases through the operating budget for administration but further finds that a sufficient level of support is currently provided through desegregation funding.

The KCMSD next queries whether it was the Court's intent to disallow the equity adjustments previously provided by the Court in its Order of June 25, 1992. The Court finds that this equity adjustment for administrative and non-represented personnel was previously approved by the Court but not fully implemented by the District. While this adjustment would result in an initial increase of over two percent in FY93-94 it is the intention of the Court that this equity adjustment be allowed. The Court having previously allowed such an adjustment is not inclined to subsequently disallow it. The Court considered the flat rate two percent per year incremental adjustment ordered on June 30, 1993 to be made in addition to the equity adjustments approved in the June 25, 1992 Salary Order. Therefore, the Court will disallow the step increases for those persons contemplated by the District's motion but the Court will again approve the equity adjustments allowed in the June 25, 1992 Salary Order.

The last issue for consideration by the Court is the State's motion for an order expressly establishing a right of contribution both retroactively and prospectively. The matter was originally brought before the Court as a part of the Salary dispute previously resolved by the Court's Order of June 30, 1993. The Court is currently in the process of evaluating the submissions of the parties on this issue and expects that a ruling will issue in the near future. However, as of this date, the Court will not announce its findings as to the contribution issue. The Court will defer ruling on this issue at this time.

Accordingly, it is hereby

ORDERED that the KCMSD's motion for approval of final FY92 staging costs is approved; and it is further

ORDERED that the KCMSD's motion to alter or amend the Court's June 30, 1993 Salary Order is granted in part and denied in part; and it is further

ORDERED that the step increases for administrators and other non-represented personnel contemplated by the KCMSD's motion to alter or amend the Salary Order of June 30, 1993 are not allowed by the Court; and it is further

ORDERED that the equity adjustments previously ordered by the Court in its June 25, 1992 Salary Order are again approved for inclusion in the Salary Order of June 30, 1993 as amended herein and that the administrators and other non-represented personnel are to receive a flat two percent per year increase in compensation; and it is further

ORDERED that the joint motion for approval of *Milliken II* funding is granted in part and denied in part; and it is further

ORDERED that the joint motion with respect to those items subject to the joint stipulation is granted; and it is further

ORDERED that the joint motion with respect to the adjustment for special education teachers in the Base Budget component is granted; and it is further

ORDERED that the joint motion with respect to the maintenance component is granted except that the District is directed to use August 1991 as the baseline for calculation of desegregation related maintenance expenses; and it is further

ORDERED that the joint motion with respect to the security component is granted in that the current budget is ordered extended but the Court denies the motion for additional personnel or equipment except the Court will allow the expenditure of desegregation funds for walk-thru metal detectors as proposed; and it is further

ORDERED that the joint motion with respect to the Effective Schools is granted and funding is approved for FY93-94 and the District is directed to submit to the Court a complete evaluation of the program in the event the District returns to the Court for renewal of funding; and it is further

ORDERED that the joint motion with respect to Full-Day Kindergarten is granted and the State's request for offset of S.B. 380 monies is denied; and it is further

ORDERED that the Court approves the budgets as submitted except as modified herein with joint and several liability; and it is further

ORDERED that the District shall use the AAA minimum standard; and it is further

ORDERED that the motion of the State for an order expressly establishing a right of contribution is deferred pending further analysis by the Court.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: July 30, 1993

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: April 16, 1993]

This matter comes before the Court on the Kansas City Missouri School District ("KCMSD") and Plaintiffs' Joint Motion for Approval of the Long Range Magnet Renewal Plan ("LRMRP") and also, Plaintiffs' Proposed Additions to the LRMRP. The State of Missouri ("State") has responded as well as the American Federation of Teachers Local 691 ("AFT"). This matter was the subject of extensive briefing before this Court. A hearing was held in two parts and the Court received evidence concerning the LRMRP. Additionally, the Court received substantial post-trial briefing from the parties. Based on the arguments presented by the parties in the above referenced pleadings and on the evidence presented during the approximately three weeks of hearings the Court will grant the KCMSD and Plaintiffs' motions in part and deny them in part as set out below.

The Court will first note that the District has been adjudged a constitutional violator in the action before this Court. It is somewhat ironic the posture that this case has taken over the many years it has been ongoing. The District, a constitutional violator, is now before this Court on joint motion with the

plaintiff school children requesting that the Court extend for ten years a magnet program with an estimated budget, in 1992 dollars, totalling well over $500 million. The State, also a constitutional violator, has historically opposed the implementation of any program offered to desegregate the KCMSD. The Court recognizes that the State has had to bear the brunt of the costs of desegregation due to the joint and several liability finding previously made by the Court. However, the State has *never* offered the Court a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD.

The Court must consider the history of this case before it can pass on the ten-year extension proposed by the District. More importantly, a ten-year extension of the Magnet Program requires that the Court carefully evaluate both its perceptions and those of the parties of what the future of this case will bring. The Court recognizes that there has been substantial activity in the Missouri Legislature which could impact significantly on the ongoing administration of the KCMSD desegregation program. Additionally, there are other components of the desegregation program already implemented by the Court which must be considered before the Court may pass on a ten-year extension of the Magnet Program component. The Magnet Program does not operate in a vacuum, therefore, any proposed extension should not be considered without full weight being given to the other aspects of the KCMSD desegregation plan.

A point of much concern to the Court, yet barely addressed by either the District or the plaintiffs, is how the KCMSD proposes to ultimately fund the school system developed under the desegregation plan. The Court finds it greatly satisfying that the District is willing to plan and assume its desegregation obligation over the next ten years. It is without question a necessity to make sufficient plans to provide for a stable school system and to make it even more attractive to non-minority suburban and

private school children and their parents. However, a glaring omission is a plan by which the District proposes to fund this wonderful school system being built.

Statement of the Case

In the Joint Pretrial Order the parties listed their different views of the issues to be presented to the Court in the LRMRP Hearing. The Court finds it is appropriate to set out each of the parties understandings as it is necessary to the ultimate resolution of these issues.

The Kansas City. Missouri School District

On September 1, 1992, the KCMSD, together with the Jenkins plaintiffs filed with this Court a Joint Motion for approval of the LRMRP. The LRMRP provides for the continuation and funding of existing magnet programs on a modified basis over the next ten years. Additionally, the LRMRP provides for the implementation of certain new magnet programs, notably at the remaining traditional elementary schools as necessary to address an accelerating trend of racial isolation in those schools. The LRMRP includes a ten-year budget (stated in 1992 dollars), to be funded by the State of Missouri and the KCMSD on a joint-and-several basis. The LRMRP is designed to enhance the KCMSD's ability to attract to its schools new students, both minority and non-minority, and thereby present the most reasonable prospect of continuing desegregative progress in Kansas City's schools. (Joint Pretrial Order at 1-2).

Plaintiffs

In addition to their role in working with the District to develop and submit to the Court the LRMRP, on November 13, 1992, plaintiffs separately filed with the Court a motion for an order approving certain additions and other changes to the proposed Renewal Plan. Plaintiffs thus seek approval by the Court of the LRMRP as modified by their subsequent proposal in 25 specified respects. While the KCMSD agrees that most if not all of plaintiffs' proposed modifications would enhance (to greater or lesser extent) the Renewal Plan, the District does not in most instances view them as absolutely necessary to the future success of the LRMRP.

The AFT

The AFT generally supports the LRMRP with certain modifications. The AFT did not take an active role in the hearing except to the extent that it elicited testimony regarding the possible effects of any changes in the LRMRP on the ultimate ability of teachers to perform their responsibilities.

The State of Missouri

On November 13, 1992, the State submitted to the Court a memorandum in opposition to plaintiffs' and the KCMSD's Joint Motion for approval of the LRMRP. Characterizing the original (and current) Long Range Magnet Plan as a failure, the State requested that this Court reject the ten-year Renewal Plan and order only a one-year extension of the existing magnet programs at current budgetary levels. Moreover, the State proposed that there occur an additional analysis during the one-year extension of the status of the magnet program as a desegregation remedy in this litigation; such analysis would identify whatever particular magnet programs or schools should be preserved from termination after the conclusion of the one-year extension. Furthermore, the State requested a Court order that the KCMSD (beginning in 1994-95 and for a total of at least three school years) turn over to the Missouri Department of Elementary and Secondary Education three District elementary schools for implementation of an Outcome-Based Education pilot program. The State also proposed that, if the ten-year extension and expansion of the magnet plan is approved, the Court remove control of the operation of the KCMSD from the current Board and Administration. (Joint Pretrial Order at 3).

Contested Issues of Fact and Law

The parties were unable to agree on the contested issues of fact and law and submitted their own separate statements on what each thought the appropriate issues were. The District submitted the following issues. First, whether the magnet programs have contributed to improving the educational lot of the victims of unconstitutional segregation and whether approval of the LRMRP would likely result in additional educational progress. *See, Jenkins v. Missouri*, 855 F.2d 1295, 1302 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989).

The second issue was whether implementation of the magnet plan has contributed toward the Court's goal of regaining those students who earlier participated in white flight and retaining those who stayed in the KCMSD, and whether the LRMRP would result in the attraction and retention of additional non-minority students. Next was whether the magnet programs have redistributed the students within the KCMSD for maximum desegregation and whether the LRMRP would result in the stabilization and further enhancement of desegregative gains.

The fourth issue raised by the District was whether the proposed LRMRP developed by the KCMSD and plaintiffs was appropriately based upon a careful analysis of the plan's impact upon other components of the desegregation plan, and is geared toward (a) maximizing the future achievement of desegregation with a minimum amount of resources; (b) providing long-term stability, including in terms of future financing; and (c) incorporating a carefully designed marketing program based upon clearly defined themes. Next, was whether the proposed staffing, non-salary resources, and related capital projects proposed in the LRMRP are necessary to the success of the programs and general curriculum at the magnet schools; and whether the staffing concerns raised by plaintiffs in their supplemental proposal are necessary to the success of the magnet programs. *See, Liddell v. Board of Education*, 967 F.2d 1241, 1245 (8th Cir. 1992).

The last issue raised by the District was whether approval by the Court of (1) the LRMRP, or (2) the one-year extension proposed by the State, including the takeover of three elementary schools for implementation of an OBE program with the express understanding that the magnet program would be partially or completely dismantled over time — would better promote desegregation as envisioned by this Court throughout its monitoring of the present litigation.

The plaintiffs raised the issue of whether the 25 separate proposed additions were appropriately considered as a necessary part of any LRMRP to promote and sustain the desegregation of the KCMSD. Plaintiffs' next issue was whether their proposed additions were necessary to promote and achieve academic success in the KCMSD. Lastly, the plaintiffs raised the issue of whether it is necessary and appropriate to implement a ten-year LRMRP.

The State raised a series of issues as to the previous effectiveness of the magnet programs in general and specifically as to any future implementation. The State first asked whether the current magnet program has had sufficient desegregation or academic achievement success to warrant a continuation or expansion of new, untested themes in the KCMSD. The State next presented the issue of whether the KCMSD under a new magnet program could attract sufficient additional non-minority students to attain a district-wide or school-by-school ratio of 60% minority 40% non-minority or whether the new magnet program could ever provide academic achievement to a level constitutionally required to enable the KCMSD to attain unitary status. The State raised the further issue of whether magnetizing all of the currently "traditional" elementary schools was necessary to meet the goals stated above.

The next area of interest to the State was appropriately finance. The State raised the issue of whether a long-term financing program has been developed by the District to (1) fund

the District's share of the desegregation remedy beyond the current year and (2) provide a funding mechanism by which the District will continue the magnet programs after State funding is no longer required. The issue of whether the capital resources proposed for the first year of the LRMRP were justified was also raised.

The State raised the further issue of whether a one-year interim continuation of the present magnet school program would be appropriate to allow for additional study and evaluation of the magnet program. Also offered was whether the Outcome Based Education model in three of the schools might provide a better basis for education in the KCMSD. Additionally, the State raised the issue of whether the possibility of a Voluntary Interdistrict Transfer program might allow for implementation of a less costly magnet program.

Lastly, the State brought forward the issue of whether the study of demographic trends within the KCMSD and surrounding census areas and the public opinion survey of resident parents of the school districts surrounding the KCMSD, both of which were conducted by State experts and which (as argued by the State) limited additional attractiveness to non-minorities and virtually no potential to reach 60/40, provide a basis upon which the Court should deny the extension and expansion of the magnet plan and justify a one-year evaluation period. Moreover, the State was concerned with whether the proposal for neighborhood schools warranted additional time and consideration.

With this background of the posturing of the case in mind, the Court will proceed to address the contentions it believes are necessary to the resolution of the main issue before the Court: whether the Court should order the ten-year extension and expansion of the magnet programs *and* hold the State financially accountable for the LRMRP throughout the entire period.

FINDINGS OF FACT

After due consideration of the evidence presented by the parties at both parts of the hearing on this matter, the Court makes the following findings of fact:

1. Since 1986 the KCMSD magnet school plan has made substantial progress toward desegregating the schools of Kansas City. It has eliminated all fifteen elementary schools that had suffered the most intense racial isolation and it has substantially improved the elementary school exposure index.

2. While several secondary magnet schools have not been in operation for more than a few years, some progress has been made in integrating those schools. Several middle and high schools have achieved high levels of integration, including King Middle School of the Arts, Lincoln Prep and Paseo Academy. Other secondary schools have programs that should, in the future, increase desegregative success.

3. The KCMSD magnet school program has had some impact upon residential choices of Kansas Citians. There is evidence that because of the magnet schools some parents of white students who would earlier have moved out of the KCMSD have stayed and enrolled their children in the magnet schools.

4. There remains a substantial pool of non-minority students, especially in surrounding Missouri school districts, who are interested in attending and may be persuaded to attend the KCMSD magnet schools.

5. A ten year extension would have a positive impact on the attractiveness of the KCMSD magnet school programs by offering stability and continuity to prospective participants. Additionally, a ten-year extension would undoubtedly be of benefit in attracting quality teachers and administrators to the magnet schools.

6. The District has gone through an extensive evaluation and planning process in its preparation of the LRMRP. However, the District has provided the Court with a plan based solely on the theory that *all* of the schools in the KCMSD should be magnetized.

7. The evidence supports the conclusion that there has been increased racial isolation in the traditional elementary schools since the implementation of the LRMP. Moreover, there exists some evidence which suggests that some students have responded positively with respect to academic achievement within the magnet elementary schools.

8. The evidence before the Court supports the conclusion that a substantial number of patrons of the KCMSD advocate the continuation of some form of traditional elementary school education.

9. Extending the magnet program to include all of the currently traditional elementary schools would not, based on the current evidence, significantly impact the desegregative or achievement effort of the current magnet plan. Furthermore, based on the current sentiment testified to in the hearing, there is a significant population supporting traditional elementary school education and this population is very important to the ultimate success of the desegregation effort in the KCMSD.

10. The Montessori programs presently in the elementary schools have been an extremely popular theme. There have been long waiting lists for this theme. The evidence sufficiently supports the addition of one more Montessori elementary school.

11. The Outcome Based Education (OBE) program offered by the State has several components which are educationally attractive. However, the OBE program is an educational delivery methodology which does not rise to the level necessary to build an entire theme for a magnet school.

12. The OBE program offered by the State is not a credible alternative to the LRMP currently in effect.

13. There is an astounding lack of evidence to support the State's proposition that it should take over and operate three elementary schools within the KCMSD. The proposal by the State, through its purported experts, lacked sufficient specificity to be considered in any way credible.

14. The LRMRP, as proposed, makes significant changes to the current structure of the administration in the KCMSD. The current fiscal climate and the requirements of effective delivery of services within the magnet school program do not necessitate the extreme reorganization contemplated by the LRMRP.

15. The LRMRP, while making some very important changes in magnet themes, is too extensive a change at this time to justify its implementation.

16. There are certain theme changes that are supported by the evidence.

17. The Court finds that the evidence presented by the District with respect to achievement data to be generally credible. The Court finds that the evidence is clear that there has been a trend of improvement in academic achievement in the KCMSD. However, the Court is not satisfied that the District has reached anywhere close to its maximum potential because the District is still at or below national norms at many grade levels. Nor does the Court find that the data presented by the District is necessarily indicative of a clear trend of the magnet schools consistently outperforming the traditional schools. The Court finds that there is no way to make a competent comparison at the higher grade levels as no traditional schools exist at these grades. The Court finds that the achievement data provided by the District is reliable but is not probative to the extent which the District used to make its sweeping conclusions as to academic success.

Moreover, the Court finds that the studies conducted by the State are reliable but not to the extent necessary to draw the doomsayer's conclusions reached by the State with respect to the success of the magnet program. The Court finds that the achievement success of the magnet schools has been positive overall but is not truly reflected by the conclusions asserted by either party.

18. The Court finds that the District, through the magnet program, has made positive steps towards reaching the desegregation goals of the Magnet Plan. This is evidenced by the testimony of the District's expert, Dr. Gary Orfield, showing the exposure index to have made positive changes during the course of the LRMP. However, the Court finds that the District's overall minority/non-minority ratio of 74%/26% does not comport with the requirements previously announced by this Court for the desegregation objective of the Magnet Plan.

19. Neither the District nor the plaintiffs has offered a plan for financing the expanded magnet school program. The Court finds that it would be inappropriate to order such a long-term extension of the magnet program without a clear method of financing it other than relying on State funding through joint and several liability.

20. In order to have a clear view of the future of the magnet school program, as well as the desegregation program generally, and in light of the changes of state leadership and the activity in the Missouri Legislature, it is necessary for the Court to have before it a viable plan by which the District will fund and operate the magnet schools of the KCMSD after Court ordered funding by the State is withdrawn.

Extension of the LRMP

The Court is faced, as usual, with diametrically different proposals provided by the parties in this litigation. The Court has previously found that the desegregation program which this

Court has undertaken requires a magnet component in order to succeed in reaching the goals which have been repeatedly articulated by this Court. However, neither of the proposals put forth by the parties in the LRMRP hearing phase comport with the requirements of the magnet component as envisioned by the Court. Each of the parties have submitted concepts which should definitely be included in the magnet component. However, the Court is left with the undesirable prospect of formulating, on its own, the magnet component for the desegregation plan.

In the past the Court has consistently allowed the District to indulge in speculation as to what benefits different magnet programs will have in the KCMSD. In short, the Court has allowed the District planners to dream. The Court then has provided the mechanism for these dreams to be realized. The Court has found that many aspects of the LRMP have been completely successful. The testimony of the students, parents, and teachers as to the rejuvenated physical plant of the KCMSD stands in sharp contrast to the testimony which precipitated the Court's original formulation of the magnet school program. There is no doubt that the educational opportunities afforded in the magnet schools are better than that previously available. However, the LRMRP offered by the District and plaintiffs illustrates the District's ability to dream. The Court finds that it is time that the District be subject to a very definite reality check. The plaintiffs have recognized that in several areas the District has sought to cut the current magnet programs to justify its extravagance in the LRMRP. However, the plaintiffs are just as guilty in that they too, have included extravagant expansion of the magnet component.

In fashioning the magnet component to the desegregation remedy initially, the Court ordered the construction and implementation of certain well-defined magnets. Many of these magnet themes have been very successful in attracting and retaining non-minority students. The Paseo Academy has been successful

as exhibited by the waiting lists for admission. Additionally, the Montessori programs have been quite attractive at the elementary school level. The Lincoln College Preparatory Program also has been successful in attracting non-minority students. Moreover, each of the above listed programs have impacted the achievement of both minority and non-minority students in a very positive way.

The parties agree, if but on only one thing, that some of the themes implemented in the LRMP have not been as successful as predicted when they were submitted to the Court. The District has not appropriately identified the magnets which are unsuccessful. Rather, the District has used the LRMRP as an opportunity to again reassign responsibilities and job descriptions. There has been a very significant introduction of new themes at the elementary school level and an adjustment to feeder patterns throughout the magnet program. The Court applauds the better definition of feeder patterns by the District but finds that such accomplishments may be made without magnetizing all of the elementary schools in the district.

The Court sets the following guidelines for the District to use in the further implementation of the LRMP. The Court will first note that it is *not* adopting the extensive restructuring of the LRMRP. It is just as true that the Court is *not* adopting the one-year roll-over, for the purpose of finding the best way to dismantle the magnet program, as proposed by the State. What the Court *is* adopting is an extension of the magnet component of the desegregation program with certain specific additions and with the express understanding that the District may make modification to themes within the current structure *and budget* in order to eliminate ineffective themes and ensure that the magnet program meets the previously announced goals of desegregation and achievement.

The Court has found that the Montessori elementary education program has been a highly successful magnet theme. Therefore, the Court will order that the District establish one additional Montessori magnet theme. The District shall use the new elementary school which is to come into the school system in the 1993-94 school year for the new Montessori school. The Court will allow for the modification of this school's budget to account for the implementation of the Montessori theme. The budget offered by the District for such an additional Montessori elementary school under the LRMRP presupposed a change in personnel and structure which the Court does not adopt. Rather, the District should use the current Montessori program budgets as the model for implementation of the new elementary school.

The six "1986-87 Magnets" — *i.e.*, Lincoln College Prep, the Southwest Cluster, and Swinney-Volker — have been responsible for differing degrees of success. Nonetheless, the Court finds that they should be extended through the period contemplated by this order. These 1986-87 Magnets should be funded under the Magnet Plan as adopted by this order. However, the Court finds that the District shall continue to fund the schools represented as the 1986-87 Magnets at the same level as they currently exist with the exception of modifications made necessary at Lincoln College Prep as discussed below. The Court specifically finds that the changes to the budgets of those other 1986-87 Magnets as proposed by the District in the Renewal Plan are not to be implemented. The Court finds that it is imperative to the continued success of programs such as Swinney-Volker that the budgets be maintained at the current levels. The District should be able to continue the operation at the current levels as the Court is in essence ordering the transfer of the 1986-87 Magnet funds to be, appropriately, a component of the LRMP budget approved herein.

The Lincoln College Preparatory program has been a very successful program. The Court finds that the expansion of seats proposed by the District for this program to be an appropriate method of expanding the accessibility of this program. More-

over, the Court finds that the conversion of the Middle School facility and the integration of this program with that of the high school at Lincoln College Prep would have a beneficial effect on the ability of the District to implement this highly successful theme. The Court will order that the District implement the changes necessary to transform the Lincoln South facility into the College Prep middle school facility. Again, the Court finds that the current budget allocated to those programs to be transformed should be adequate to fund the resulting middle/high school programs. However, should the District find that there exists a budgetary shortfall or windfall in this area, as a direct result of the conversion, the Court will entertain motions for adjustments as necessary.

The Court has considered the LRMRP's modification to the Foreign Language Immersion Program and finds that the purported benefits do not justify the significant changes to the program. This is a result of the Court's refusal to magnetize all of the elementary schools in the district. The LRMRP's adjustments to the Foreign Language Program presupposes total magnetization. The Court has not agreed that the traditional schools should take on the themes as suggested in the LRMRP. Therefore, the theme changes in the Foreign Language Program are inappropriate. The Court does find that the District is correct in its assumption that the Full Immersion programs are successful. The demonstration made by the third-grade science class, in french, at trial was very impressive. As the Court has stated on many occasions, it is not an expert on the methodology of educational instruction. Therefore, the Court will grant the District the appropriate latitude to implement full-immersion programs within the language programs available under the LRMP. The Court will deny any other modifications as they might apply to the traditional elementary schools.

The Court finds that the Lengthened School Day and Extended Year programs are both successful programs in promoting desegregation and achievement in the KCMSD. However, the changes promoted by the Renewal Plan are not going to be adopted by the Court as a part of the Renewal Plan. The Court finds that these programs should be continued as they are currently being administered. The Court will order continued funding of these programs as done under the LRMP and under the other funding components of the desegregation program. There shall be no changes as to these two programs.

The Renewal Plan proposes significant changes in the area of staffing. This has been a primary concern to the Court throughout its evaluation of the Renewal Plan. The State is correct in its assertion that the management of the magnet program has been anything but stellar. (The Court has taken the liberty of summarizing the State's consistent position on the management of the magnet program). The Renewal Plan proposes what the Court interprets to be an entirely new level of administration for the magnet plan. If there is one thing that the KCMSD certainly has enough of it is administration. The administration of the magnet schools has, in many instances, left much to be desired. The last thing this Court is inclined to do at this point in the development of the magnet program in the KCMSD is to add another layer of administration. The Court is quite satisfied that the teachers have given their best efforts in educating the young people in the KCMSD. However, the administration, from the building supervisors up, need to work with much more industry to effectively implement the current themes offered in the district. The Court has become aware on several occasions of administrators who have not adequately sought to become certified in their respective theme. It is because of the current state of the administration in the magnet programs that the Court finds that the implementation of the changes in the Renewal Plan are wholly inappropriate.

The Renewal Plan proposes an extensive process for evaluation of the magnet plan. This process of evaluation appears to include a large amount of administration. While the Court finds

that evaluation of the magnet program is desirable and necessary, the Court finds that the program offered by the District through the Renewal Plan does not attain the goal of evaluation in the most cost effective manner. The Court will instruct the District to make arrangements to effectively evaluate the magnet programs over the extension period. The Court will view the results of the District's efforts with a very critical eye at the point in the future where the Court is called upon to determine any additional extensions.

The next item considered by the Renewal Plan is the non-salary budget. The District has made extensive analysis of the individual magnet programs and developed an estimate of what the upkeep on these programs will be over the next ten years. The Court finds that the figures presented by the District are unreliable because they are based on the primary assumption that the Renewal Plan would be adopted as proposed, including the many changes in themes. The Court does recognize that the equipment provided in the original LRMP has a finite life. The current budgeting process used by the district includes provisions for capital replacement. The District may argue that the inclusions are insufficient. The Court, at this point, will deny the extensive magnet resource component of the Renewal Plan and order the District to continue operation of the magnets within the budgets as currently set for their operation. The plaintiffs illustrated the problem of ordering a strict one-year roll-over of the budgets in that there are several items which were one-time expenses that do not need to be included in a subsequent budget. The Court has considered this fact and finds the plaintiffs' point to be well taken. However, the Court will allow the District the budgetary flexibility, subject to review by the DMC as per the past course of business, to make appropriate adjustments for the upcoming school years.

The last area of concern to the Court in the Renewal Plan is the capital facility requirements. The Court has reviewed with

severe dismay the progress of the Capital Improvement Project previously ordered by this Court. The Court is aware of significant difficulties with the Project Management Team and bringing the project in on-time and on-budget. The Court has previously denied the implementation of the many new themes requested by the District under the Renewal Plan. The prospects of a voluntary interdistrict transfer program and pending legislation in the Missouri Legislature both support the Court's decision to deny the capital improvements requested by the District in the Renewal Plan. As it has been well shown that the capital facility requirements are being met under the current plan, the Court finds that it would be inappropriate to extend that program at this point.

The Court finds that a ten-year plan by the District as to the future of the magnet plan and the desegregation program in general is a superior concept. The Court supports the District's effort in that regard. The Renewal Plan offered by the District is not supported by the evidence and for the reasons previously announced the Court will deny its adoption.

The magnet program has provided significant advantages to the students of the KCMSD. The neighborhood school options, however, are a very important aspect of the KCMSD system generally. The Court has helped the District fashion a magnet program to allow a choice to the non-minority parents and students enrolling in the KCMSD. However, the District's Renewal Plan fails to protect this same choice to those currently living in the KCMSD. The opportunities available in the traditional schools are important to a significant number of parents and students in the KCMSD. The Court is troubled by the fact that these traditional schools have maintained a pattern of racial isolation. The Court finds that this is in part due to the poor planning and administration of the KCMSD. The District should explore more carefully its options in assigning students to reduce racial isolation. The evidence showed, on more than one occa-

sion, that racially isolated schools (90+ % minority) exist in predominately non-minority neighborhoods. This evidences to the Court either a lack of effort or an intent on the part of the District.

The Court has before it the motion for a ten-year extension of the magnet plan. It is important to the Court that the magnet plan be maintained, as is, due to its positive impact on both the desegregation effort and on achievement. However, the plan offered by the District does not accomplish the needs of the magnet plan. The Court will order a two-year extension of the current plan with the modifications as outlined above. This two-year extension is necessary to maintain the integrity of the programs currently offered and to allow the District to better measure the effectiveness of the programs.

The District has repeatedly requested that the Court provide extravagant programs based on the hopes that they will succeed in the desegregation effort. The Renewal Plan offers many of these same types of extravagances. The Court finds that the current plan has both the present and future potential to succeed in its major effort of desegregation. What the Court needs from the parties is an effective method by which the District may fund its share of the programs. The District's proposals do not include a viable method of financing any of the programs.

The Court, in giving due consideration to the viability of any future extensions of the Long Range Magnet Plan, has found that certain information would be beneficial. The economic feasibility of financing the desegregation effort in the KCMSD has not been addressed sufficiently for the Court. The Court, therefore, instructs the District to submit a financing proposal to the Court and in doing so it should follow the assumptions as set forth below.

First, the District is instructed to submit a plan reflecting the ability of the District to fund the magnet schools and the entire

school district at a level commensurate with the current funding or at least at a level where the same quality of both facilities and instruction may be maintained. In formulating this plan, the District should assume that the current Court ordered funding would be withdrawn at the alternative intervals of three, five, seven, or ten years from the date of this order. Based on this assumption, the Court instructs the District to submit a plan showing what is necessary to fund the school district through the operating budget alone. The Court expects the District to provide fairly complete operating budget projections for each of the above listed scenarios.

If the current method of financing is insufficient, the District should submit the financial ramifications of at least two financing alternatives and should use the current bills pending in the State Legislature as guides. Next, the District should present the Court with its analysis with the assumption of a status quo in the Foundation Formula. If the District chooses to submit additional analyses with varying Foundation Formula funds its assumptions should be made clear to the Court. Lastly, should the District have a solid basis to include the effect of a Voluntary Interdistrict Transfer Plan the Court would be interested in having the analysis to include such an assumption. However, the Court will order that the District provide the Court with at least one analysis that includes no VIDT plan.

Second, the State is instructed that if it so chooses, it may submit plans with the similar assumptions as outlined for the District above. The Court is not ordering the State to submit such a plan but if the State finds that it has sufficient information available to make an instructive proposal then the Court will certainly be willing to evaluate such information. The Court encourages the State to submit a financing plan.

The Court has found that the above requested information would be most helpful in analyzing the long term planning for the

desegregation plan. Therefore, the Court will order the District to submit its analysis by June 30, 1993. The State will also have until September 1, 1993 to submit any analysis which it finds would be of benefit to the Court.

Accordingly, it is hereby

ORDERED that the KCMSD and plaintiffs' motion for approval of the Long-Range Magnet Renewal Plan is denied in part and granted in part consistent with this order; and it is further

ORDERED that the current LRMP is extended for a two-year period with the same budgetary levels subject to reasonable modifications with the supervision of the DMC; and it is further

ORDERED that the District is to implement a procedure to consistently measure and evaluate the effectiveness of the magnet programs and this is to be done within the current budgetary constraints of the magnet program; and it is further

ORDERED that the District is to implement a Montessori theme at the new elementary school to come on-line for the 1993-94 school year; and it is further

ORDERED that the District request to modify the themes at Lincoln College Prep and Middle School is granted; and it is further

ORDERED that the State's request to operate three District schools under an OBE program is denied; and it is further

ORDERED that the District is to submit a financing proposal as outlined herein by June 30, 1993; and it is further

ORDERED that the State may, but is not required to, submit a financing proposal by September 1, 1993; and it is further

ORDERED that the capital improvements requested by the District are granted only to the extent necessary to implement the theme additions and modifications approved by the Court herein.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: April 16th, 1993